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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 77-102

DENNIS KEHN and PETER MIHALIC,

Petitioners,

v.

THE STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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Petitioners, Dennis Kehn and Peter Mihalic, pray that a writ of certiorari issue to review the judgment herein of the Supreme Court of Ohio entered in the above entitled case on April 20, 1977.

No petitions for rehearing were filed.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is printed in Appendix A hereto, and is reported at 50 Ohio St.2d 11. The opinion of the Court of Appeals for Cuyahoga County, is printed in Appendix B, and is not reported. No written opinion was rendered by the Court of Common Pleas, Cuyahoga County, Ohio, the case having been tried to a jury.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on April 20, 1977. No petition for rehearing was filed. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether defendants in a state criminal trial are prejudicially deprived of the constitutional rights to trial by a fair and impartial jury, confrontation of witnesses against them, and due process of law, when a jury foreman during trial, in direct contravention of a trial court's admonitions and instructions, secretly compiles notes and charts of evidence together with erroneous outlines of law and philosophy, and employs same during deliberations with his fellow jurors.

2. Whether defendants in a state criminal trial are prejudicially deprived of the constitutional right to due process of law when state courts require the accused to demonstrate prejudice from infringement of a constitutional right, rather than placing the burden on the state to establish beyond a reasonable doubt that such infringement was harmless error.

3. Whether defendants in a state criminal trial are prejudicially deprived of the constitutional rights to compulsory process, to present a defense, and due process of law, when a trial court prohibits defendants from presenting witnesses in their own behalf whose testimony would be competent and relevant to the issues presented for the jury's determination, and, if admitted, would contradict testimony of the chief state witness, and demonstrate bias and prejudice of said witness against the accused.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V

"No person . . . shall be . . . deprived of life, liberty or property without due process of law . . ."

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

Amendment XIV

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law . . ."

STATEMENT OF THE CASE

Petitioners, Dennis Kehn and Peter Mihalic, were indicted by the Grand Jury of Cuyahoga County, Ohio, on April 9, 1974. The multiple count indictment charged petitioners, then officers of the Cleveland Police Department, with thirty-two felony violations. Ten unindicted co-conspirators were also named in the indictment, one of whom was the state's chief witness, Charles Broeckel, who first advised the police and F.B.I. that the crimes, predominantly burglaries, had been committed with the help of these police officers who acted as "watchdogs" during perpetration.

Broeckel, who was incarcerated on other unrelated charges, offered to testify against the officers, petitioners herein, in exchange for shock parole, and assurance that he would not receive time for any crimes that he admitted to at trial.

On June 18, 1974, trial to jury commenced. Broeckel's testimony was the only evidence directly implicating the police officers in the series of burglaries and related crimes which occurred within the boundaries of the Sixth District, where Sgt. Kehn and Lt. Mihalic were stationed. Most of the remaining state's witnesses were victims of crimes and investigating police officers.

In his lengthy testimony, Broeckel narrated his version of each of the felonies in detail. Included in his narration was testimony that one Allen Pannetta, an unindicted, named co-conspirator, participated in six of the burglaries. Over objection by counsel for petitioners, Broeckel testified that Pannetta, a Penn-Central Railroad Company employee, could punch in at the railroad and then leave for the balance of his shift, and worked split shifts, which would explain his ability to participate in the crimes with petitioners during working hours.

During the defense case, Kehn and Mihalic's counsel attempted to introduce work records of Pannetta's employer which, if admitted, would have conclusively shown that Pannetta was at work during the pertinent times on the dates the felonies occurred. Testimony of John Shuus, custodian of the records, would have further established that the records contained Pannetta's own handwriting as to the hours he worked, the presence of which would negate Broeckel's claim that Pannetta (who exercised his privilege against self-incrimination) could have left work during his shift on the days in question.

The trial court, following objection by the state, excluded Shuus' testimony on the ground the defense did not establish Shuus was custodian of the employment records.

Similarly, trial counsel attempted to introduce testimony of a defense witness, James Zimmerman, that Broeckel had referred to Mihalic as a "rotten S.O.B.". At trial, Broeckel testified that Mihalic was "a nice person". The state objected to the introduction of this testimony on the ground that it was offered to impeach a prior inconsistent statement by

Broeckel. Defense counsel asserted that the testimony was offered to show bias against the accused. The trial court sustained the objection on the ground that no proper foundation was laid for introduction of the testimony.

The remaining evidence, offered by both the state and defense, is inapplicable to the issues raised in this Petition.

At the conclusion of the state's case, 19 counts of the indictment were dismissed as to Mihalic only. On July 26, 1974, the jury, following more than two and one-half days of deliberations, returned its verdicts finding Kehn guilty of 30 counts, and not guilty of 2 counts; and Mihalic guilty on all counts presented for their determination.

On August 5, 1974, the trial judge received from the jury foreman, Anthony Parete, a notebook and legal cap sheets accompanied by a letter explaining that Parete had taken notes, in direct violation of the count's admonition not to take notes, at the conclusion of trial each day, which consisted of a summary of the testimony presented, along with Parete's personal reactions to the testimony. Additionally, he admitted to preparing charts which connected testimony to each of the crimes alleged in the indictment, and compiled written excerpts of legal and moral concepts derived from the writings of St. Thomas Aquinas, Cicero, and others. The trial court had charged the jury to consider only the law contained in its instructions.

The notes and charts were employed by the jury foreman, and circulated among the other jurors, during their deliberations.

On August 19, 1974, the trial court examined each juror as to the extent the writings prepared by Parete were used in deliberations. Each juror advised the court that the notes did not affect his or her verdict.

Both petitioners moved for a new trial on August 22, 1974, on the ground that they had been denied a fair and impartial jury, which motions were denied on August 23, 1974.

On September 3, 1974, Mihalic was sentenced to a term of imprisonment of one to five years on ten counts of which he

was found guilty, and one to ten years on the three remaining counts. Three of the one to five year sentences were ordered to be served consecutively, and the remaining sentences to be served concurrently. On the same day, Kehn was sentenced to terms of one to ten years on seven counts. Eight of the one to five year sentences were ordered to be served consecutively, and the remaining sentences to be served concurrently.

Timely appeals were perfected to the Court of Appeals, Cuyahoga County, Ohio, Eighth District, on September 19, 1974.

On appeal, petitioners both claimed the trial court erred in excluding the testimony of John Shuus, and admission of the employment records of Allan Pannetta, on the ground that such records were admissible pursuant to the Ohio business records as evidence statute, 2317.40 Ohio Revised Code.

The Court of Appeals concluded that the trial court correctly held that such testimony and records were inadmissible on the ground that the defense failed to establish that Shuus was the custodian of the records, or the person under whose supervision the records were made, as required by the statute. (App. B, pg. 8b)

Petitioner Mihalic further assigned error to the trial court's refusal to allow another defense witness, James Zimmerman, to testify as to the conversation with Broeckel prior to trial wherein he called the petitioners "S.O.B.'s". The Court of Appeals held that the trial court did err in excluding the testimony of Zimmerman, recognizing that no foundation need be laid merely to show a witness's prejudice or bias, further concluded that such error was harmless beyond a reasonable doubt. (App. B, pg. 12b-13b)

Both petitioners also assigned as error the trial court's refusal to grant new trials on the basis of juror misconduct which petitioners contended denied them their right to a fair and impartial jury.

The Court of Appeals, applying the evidence *aliunde* rule, overruled this assigned error, holding that the jury foreman's disclosure to the trial court of the notes, excerpts, and charts,

was not competent to impeach the jury's verdict, and, further, that even if it were sufficient no showing of prejudice was made by petitioners. (App. B, pg. 14b-16b)

In his concurring opinion, Presiding Judge Day stated that he would hold evidence *aliunde* had been established, but would affirm on the basis that the examination of jurors reflected no prejudice. (App. B, pg. 16b)

The Court of Appeals decision affirming the judgments of conviction was entered on March 4, 1976. Appeal was thereupon perfected to the Supreme Court of Ohio in which the aforementioned assignments of error were again raised.

On April 20, 1977, the Supreme Court of Ohio rendered a *per curiam* opinion affirming the decision of the Court of Appeals, (App. A, pg. 1a-10a)

In its opinion, the Supreme Court of Ohio held that the records and testimony to be elicited from Shuus were within the purview of the business records as evidence statute, that on the basis of Shuus' proffered testimony the Court of Appeals committed factual error in failing to so find, but that such evidence was correctly excluded because it would have created a dispute about Pannetta's participation in the crimes, which the court deemed an extraneous and collateral matter. (App. A, pg. 7a)

The Supreme Court of Ohio recognized that the exclusion of Zimmerman's testimony constituted error, but held that such error was harmless beyond a reasonable doubt.

The opinion further held that the Court of Appeals erred in determining that evidence *aliunde* was not presented to the trial court by the jury foreman. Although the Court held that such outside evidence was sufficient to suggest the possibility of prejudice, it refused to reverse on the basis that the petitioners failed to affirmatively demonstrate prejudice from the juror's misconduct.

It is for review of this judgment that the Petition for Writ of Certiorari is requested.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Ohio has decided federal questions of substance in a way not in accord with applicable decisions of this Court, and in clear violation of pertinent provisions of the Constitution of the United States.

I. Juror Misconduct

This case involves a jury foreman who usurped the function of the Court of providing a jury with accurate and complete law to follow in determining the guilt or innocence of an accused. It also presents a situation where a jury foreman, created an exhibit, styled from notes taken in direct violation of a trial court's admonition and presented such exhibit to his fellow jurors in the secrecy of the jury room for use in their deliberations.

As this Court has so firmly stated, an accused is not only guaranteed a right to a jury trial, but is guaranteed a right to a jury's verdict based upon evidence developed at trial, from the witness stand, in a public courtroom cloaked by the judicial protection of the rights of confrontation, cross-examination, and counsel. *Turner v. Louisiana*, 379 U.S. 466, 471-473 (1965).

In *Turner*, supra 473-474, the court recognized that the basic guarantees of trial by jury would be prejudicially subverted were a jury's verdict be allowed to stand where two key prosecution witnesses were allowed to testify, and then associate with the jurors in their official capacity as deputies in charge of the jury, even though the record reflected that the witnesses never discussed the case directly with any jury members.

Here, unlike *Turner*, supra, the accuseds' rights to a fair and impartial jury were denied not by a court-sanctioned intrusion of witnesses, but, rather, by an intrusion of notes and exhibits created by the jury foreman in clear violation of

court orders. Petitioners assert that the intrusion complained of below was of far greater magnitude, and clearly as prejudicial as that complained of in *Turner*.

No innocent motives can be attributed to the jury foreman's blatant disregard of the Court's admonitions and instructions in the present case.

Not only were petitioners deprived of their right to challenge the accuracy of the writings of the jury foreman pertaining to evidence presented at trial, but, also, they were deprived of the fundamental right to twelve impartial jurors who would conduct their deliberations, and reach a verdict according to the law presented to them by the Court. *Parker v. Gladden*, 385 U.S. 363, 366 (1966).

Even if the courts were to assume that the jurors were accurately able to assess the effect of the jury foreman's injection of erroneous statements of law derived from philosophical sources, the prejudice to defendants remains irrefutable, for, as this Court has stated, an accused is "entitled to be tried by twelve, not nine or even ten, impartial and unprejudiced jurors". *Parker*, supra, 366.

It cannot seriously be denied that the jury foreman was prejudiced, as reflected by his need to supplement the law given to him by the Court as well as the supplement the evidence presented from the witness stand.

II. Burden of Showing Prejudice.

In addition to failing to recognize the infringement of the petitioners' right to a fair and impartial jury trial, the Court below erroneously placed the burden of proving prejudice upon the petitioners.

Ten years have passed since this Court explicitly held that the prosecution must demonstrate, beyond a reasonable doubt, that a constitutional error is harmless before a court may hold it so. *Chapman v. California*, 386 U.S. 18 (1967).

The requirement that petitioners must show prejudice arising from the jury foreman's misconduct before reversal would lie is in clear opposition to the mandate of this Court.

It is indeed shocking that the Supreme Court of Ohio ignored this Court's direction, and denied petitioners a new trial on the basis of a one hundred year old state court decision of highly questionable application to the present case, *Armleder v. Lieberman*, 33 Ohio St. 77 (1877).

III. Exclusion of Witnesses.

Petitioners contend that they were twice prejudiced by the refusal of the trial court to allow them to present defense witnesses' testimony, and exhibits related thereto. Petitioners concede that they did not explicitly raise below the constitutional questions presently asserted, but rather contend that the deprivation of due process, and compulsory process, caused by the trial court's erroneous rulings constitute plain error for which review will lie in this Court. *Vachon v. New Hampshire*, 414 U.S. 478 (1974).

As the Supreme Court of Ohio held, the trial court and the Court of Appeals were both in error in failing to recognize that the custodian of records of an unindicted co-conspirator's employer was competent to testify as to the records under his custody. Petitioners asserted below that such records would establish that the state's chief witness was lying or mistaken about the participation of an alleged co-conspirator in crimes with which the accused were charged.

Despite this assertion, and no evidence to the contrary, the Supreme Court of Ohio held that the records were properly excluded, not because of the reasons given by the trial court, but because they would have created a dispute about collateral matters, namely, the unindicted co-conspirator's alleged participation.

Petitioners assert that the proffered testimony of witness Shuus clearly reveals that the matters he intended to present

to the jury were certainly not collateral to the issues presented in the case. As pointed out in a recent treatise, facts material to facts in issue can never be deemed collateral. Such facts include facts independently admissible to show bias, character for untruthfulness, or impairment of power to accurately observe, remember, and narrate. 3 Weinstein's Evidence ¶607 [05], pp. 607-50; 607-53; 607-54.

It is apparent that the presentation of such evidence would have cast some doubts upon the reliability of the informant's testimony. By depriving petitioners of the right to present this evidence, which was substantiated by records, the trial court infringed upon the right, fundamental in our system of justice, of the accused to present witnesses in his own defense, a fundamental element of due process of law. *Washington v. Texas*, 388 U.S. 14 (1967).

The Court compounded its initial error in failing to allow petitioners to present a defense by excluding the testimony of witness Zimmerman which pertained to the chief witness's bias and prejudice against the accused.

As the Supreme Court of Ohio properly concluded, the trial court erred in determining that the laying of a foundation was necessary to impeach the testimony of a witness by showing bias or prejudice.

Unfortunately, the court failed to recognize that the constitutional guarantees of due process of law, compulsory process, and right of confrontation, demand that an accused be allowed to present competent and relevant evidence by way of defense. *Davis v. Alaska*, 415 U.S. 308 (1974); see also, *U.S. v. Nixon*, 418 U.S. 683, 711 (1974).

It is indeed hard to imagine a more plain and prejudicial error than that committed by the trial court in the present case in refusing to allow the accused police officers to present the testimony of two key defense witnesses.

It is ironic that the trial court, and courts below, could justify allowing the prosecution to present evidence of the practices of a railroad, for which no foundation was laid, and of their chief informant's high opinion of the accused, and,

shortly thereafter, refuse the right to the accused to contradict such damaging testimony.

As this Court concluded in *Washington v. Texas*, supra at 23:

> "The Framers of the Constitution did not intend to commit the futile act of giving to a defendant the right to secure the attendance of witnesses whose testimony he had no right to use."

Petitioners assert that error of this nature is plain, and cannot be conceived of as harmless. *Chapman v. California*, supra at 23.

CONCLUSION

The relief requested in the Petition should be granted.

Respectfully submitted,

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APPENDIX "A"

Opinion of the Supreme Court of Ohio

The State of Ohio, Appellee
v.
Kehn et al., Appellants.

Supreme Court of Ohio.

(No. 76-496–Decided April 20, 1977.)

APPEAL from the Court of Appeals for Cuyahoga County.

Appellants, Sergeant Dennis N. Kehn and Lieutenant Peter M. Mihalic of the Cleveland Police Department, were indicted on April 9, 1974, for numerous related felonies, including burglary. The indictment specified that appellants and a group of unindicted co-conspirators committed 32 separate felonies between March 28, 1971, and March 7, 1972. Only Charles Broeckel, an unindicted co-conspirator, was alleged to have participated in each of the 32 crimes charged.

In December 1973, Broeckel, incarcerated on unrelated felonies, wrote a letter to a member of the Intelligence Units of the Cleveland Police Department which resulted in Broeckel's meeting with and informing an F.B.I. agent and a Cleveland police detective about certain crimes committed with police help. On January 31, 1974, Broeckel made a statement listing each crime, implicating his accomplices, and detailing the alleged participation of appellant police officers. Generally, appellants' alleged role was to act as "watchdogs" when the crimes were committed, to re-route any other police cars which came into the area, and to warn the burglars via walkie-talkie radios if anything [12] suspicious concerning the current crime was heard over the police radio.

At appellants' trial, the state's main evidence was Broeckel's testimony. Apparently, Broeckel testified in exchange for shock parole, rather than complete a prison sentence for the

earlier, unrelated felonies, and, further, in exchange for assurances that he would not have to serve time for any crimes that he admitted to at appellants' trial, even though he, and not appellants, was the only one named as a participant in each of the 32 felonies listed in the indictment.

A review of the record reveals that the state called 27 witnesses to testify. With the exception of Broeckel, most of the state's witnesses were the victims of the crimes in question and the police officers who investigated these crimes. A number of these witnesses circumstantially corroborated parts of Broeckel's testimony.[1]

[1] The following examples of corroboration were probably the most damaging to appellants.

Applies to appellant Kehn only: Broeckel frequently referred to a certain savings and loan as "Women's Federal," presumably as a code name. Kehn's duty report the night the savings and loan was held up stated: "4:10 A.M., 18314 Euclid–Womens Federal Bank–Holdup alarm–responded along with [cars] 643 and 644–place entered * * *." No institution in the area is named Women's Federal.

With respect to the same robbery, Patrolman McGrath testified that Kehn told him earlier that night that he was going to be in a bowling alley parking lot behind the bank, and thus McGrath did not need to go there because Kehn said he would be there.

Sergeant Kovacic of the Intelligence Unit testified that on June 22, 1972, pursuant to a search warrant, he participated in the search of Christopher's home and found tools that could have been used in burglaries and various papers, including an address book that listed "Denny the Cop–531-2407." The phone number was Kehn's.

With respect to a burglary of a grocery store, a James Valtman, who lived across the street behind the store, testified that he saw a white truck near the store and two men enter the store about 3:00 a.m. He then called the police. Later, Kehn responded to investigate. His duty report showed that immediately prior to that response he was at a Society Bank alarm, and a gas station holdup. However, officers who investigated these matters could not recall Kehn being there. The victim of the gas station robbery testified that he saw no sergeants or officers investigating the robbery.

Patrolman William Salupo who investigated the robbery of a woman testified that he could not recall Kehn, or anyone else, responding to the scene. Kehn's duty report indicated that he "[c]onferred with [car]

(continued)

[13] The jury found appellants guilty on selected, though not identical, counts. As to appellant Mihalic, many counts were dismissed before jury deliberation because the evi- [14] dence did not tie him in any way to certain of the crimes.

(footnote continued from preceding page)

602 concerning the victim of robbery at 647 Lakeview–advised armed robbery report * * *."

Applies to appellant Mihalic only: Broeckel testified that during one robbery he asked Mihalic how he was going to explain his time; that Mihalic lifted the hood of the police car and pulled off the radiator hose; that Mihalic said he figured it would take about two hours for a tow to arrive. Mihalic's duty report for that night showed: "4:30 [a.m.] * * * radiator hose or hoses broken, car heating up, tow ordered." The tow arrived at 6:00 a.m. The tow truck driver testified as to towing the car.

Applies to both appellants: One robbery involved a large amount of coins from a vending company. Deposit slips were introduced by the state that indicated a coin deposit of over $100 in each of Kehn's and Mihalic's checking accounts. Kehn's wife testified that she could not remember making any such deposit, and that her husband "did this." She testified that before trial she deposited a $20 bill with the amount written in the space labeled "coin," and the bank accepted it. Joan Noble, who had a joint checking account with Mihalic, testified that Mihalic was very much against smoking, and he suggested that instead of smoking that she save 50 cents a day, and that because her checking account was low, she deposited the coins saved from not smoking.

The state introduced bank records that showed corresponding increases in the checking accounts of Mihalic.

Captain Charles Mank testified that he knew both Kehn and Mihalic, and that, in 1971, he worked the platoon that followed theirs. During 1971, he saw appellants come in together after duty later than usual on two, three or four occasions.

A former bartender at the Redwood Lounge testified that he knew both Kehn and Mihalic as policemen; that he saw Kehn in the bar a couple of times both in and out of uniform; and that he saw Mihalic in the bar once in uniform. He further testified that he knew Broeckel and all the other unindicted co-conspirators either personally or as patrons of the Redwood. Detective Viola and Sergeant Vanzo testified that they had observed all the co-conspirators at the Redwood over a period of time, and that they were all known to frequent the tavern.

On August 5, 1974, ten days after the jury verdict, the trial judge received from Anthony Parete, the jury foreman, a small spiral notebook, a series of legal cap sheets, and an accompanying explanatory letter. These notes consisted of a digest of testimony; a summary and table of each crime; personal reactions to the testimony; legal concepts, a mixture of the court's and his own; and philosophical statements by St. Thomas Aquinas. Apparently, Parete made these notes daily, following trial.

The notes were taken into the jury deliberation room and were circulated among the other jurors.

On August 19, 1974, each juror was examined by the court, in the presence of counsel for both sides, "to inquire into just exactly what extent these particular paper writings were involved in the jury deliberations." Each juror answered that the notes had no effect on his or her verdict.

The trial court denied a motion for a new trial, and judgment was entered upon the verdicts. Upon appeal, the Court of Appeals affirmed.

The cause is now before this court pursuant to the allowance of a motion for leave to appeal.

John T. Corrigan, prosecuting attorney, and *Albin Lipold*, both of Cleveland, for appellee.

Gerald S. Gold and *Harry A. Hanna*, of *Gold, Rotatori, Messerman & Hanna*, of Cleveland, for appellants.

Per Curiam. The nature of Broeckel's testimony is inherently suspect and untrustworthy, and we approach it with utmost caution. We note at the outset, however, that it is not our function, but that of the jury, to determine the credibility of the witnesses. See *State v. Wolery*, 46 OhioSt.2d 316, 75 O.O.2d 366 (1976). In returning its verdict, the jury was obviously satisfied, and reasonably so, with the amount of corroboration to Broeckel's testimony.

Appellants jointly assert five propositions of law which [15] allege error at trial. Additionally, appellant Mihalic asserts two other propositions.

Appellants' first proposition of law asserts that the trial court abused its discretion in not granting a continuance where the state delayed compliance with discovery orders and supplemented its witness list with 11 new names on the second day before trial.

A review of the record reveals that on April 11, 1974, the trial court originally set the trial date for June 4, 1974. On May 28, the court, *sua sponte* and with counsels' approval, changed the trial date to June 18. Appellants' first request for a continuance was June 12.

The granting of a continuance is within the sound discretion of the trial court. Since the state relied so heavily on Broeckel's testimony, the sheer number of state's witnesses was not an inherent hardship. The majority of witnesses that the state expected to call were victims of various crimes and the police officers who investigated these crimes. Their testimony, when considered individually, would not have great impact on the case. Rather, it was Broeckel's testimony, subject to corroboration for credibility, which was the focal point of the trial. If counsel for appellants believed that the prospective witness list, which was given to them well in advance, necessitated additional time to prepare, then they should have requested a continuance at an earlier, more appropriate time. It appears that counsel is using the addition of 11 new names to the list as an excuse for their unusually late request. These new names did not alter defense counsel's preparatory strategy – their main concern was rebutting Broeckel's testimony.

The record shows that appellants were not hampered in any way by the denial of the continuance. With no showing of adverse effect, there can be no prejudicial error. We conclude that the trial court did not abuse its discretion, and accordingly overrule appellants' first proposition of law.

Appellants allege, as their second proposition of law, [16] that the trial court committed error in admitting a certain writing, purporting to be an address book with a listing of "Denny the Cop" followed by appellant Kehn's phone

number, without first identifying the writing. Appellant Mihalic asserts that he was also prejudiced by this evidence because the state constantly referred to him as Kehn's "partner."

At trial, Sergeant Edward Kovacic identified the exhibit as the telephone address book that, pursuant to a search warrant, he removed from the home of Philip Christopher, an unindicted co-conspirator, in June of 1972. Kovacic testified that in his opinion the book appeared to be the same at trial as when he originally found it, and that the book had been in the possession of the F.B.I. from 1972 until the trial.

Such testimony was sufficient to identify and authenticate the writing.

The state offered the address book to support the existence of a conspiracy involving Kehn, Christopher and Broeckel. Kehn attempted to explain how his name and telephone number could have legitimately been in the book. It was the jury's function, as trier of fact, to weigh and determine the credibility of the evidence which was properly admitted.

This proposition of law is thus overruled.

Appellants' third proposition of law is that the trial court committed error when it refused to admit certain records, railroad employee time sheets, kept in the ordinary course of business on the ground that the maker of these records was not available to testify.

Kehn attempted to introduce these railroad time sheets, together with explanatory testimony from a railroad employee, to prove that Allan Pannetta, another unindicted accomplice in certain of the crimes, was working at the time certain burglaries were committed. Kehn desired to demonstrate that Broeckel was lying, or at least mistaken, about Pannetta's participation in these burglaries.

In affirming the trial court, the Court of Appeals stated [17] that "[the railroad employee] did not testify that he was * * * the custodian of the records." This stated basis was factually in error for the record shows that the witness was asked no less than four times if the record was "under your

custody or control." Each time, the witness answered affirmatively.

However, the evidence was correctly excluded because it would have created a dispute about extraneous or collateral matters, *i.e.*, Pannetta's participation. Kehn and Mihalic were on trial, not Pannetta, and the court, by excluding the testimony, avoided the dangers of surprise, jury confusion and wasted time which are the reasons for the rule against impeachment on collateral matters.

The trial court's exercise of discretion involved the weighing of the probative value of the offered evidence against its potential misuse by the jury. No abuse of discretion is evident, and this proposition of law is accordingly overruled.

In their fourth proposition of law, appellants assert that the trial court erred in admitting in evidence purported business records, bank deposit slips, without first determining that the records were made under circumstances justifying their admission under R.C. §2317.40.[2]

The state sought to introduce these bank records as circumstantial evidence of a coin payoff following a vending machine company burglary as testified to by Broeckel. These records, copies of two bank deposit slips, showed a deposit to each of the checking accounts of Kehn and Mihalic. Both slips indicated that the deposits were made in coin. The assistant to the special records officer testi- [18] fied that his department is custodian of the bank's records. He identified

[2]R.C. §2317.40 states, in pertinent part:

"A record of an act, condition, or event, in so far as relevant, is competent evidence if the custodian or the person who made such record or under whose supervision such record was made testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission."

one of the offered exhibits as a copy of a deposit slip which was under his care and custody in the normal course of business, and explained that the amount deposited was entered in the space designated "coin."

The trial record does not indicate that either appellant objected timely to the introduction of the deposit slips as evidence. Rather than objecting, appellants sought to offer explanations of the deposit slips.

We conclude that the deposit slips were properly qualified under R.C. §2317.40. This proposition of law is without merit, and is overruled.

Appellants assert, in their fifth proposition of law, that the trial judge's possession of the notes made by the jury foreman constituted evidence *aliunde,* thus permitting inquiry into possible misconduct by the jury. Appellants assert further that if such material is brought into the jury room, then it is error which requires a new trial.

The verdict of a jury may not be impeached by the testimony or affidavits of a member of that jury unless there is evidence *aliunde* impeaching the verdict. See *Diehl v. Wilmot Castle Co.,* 26 Ohio St.2d 249, 55 O.O.2d 484 (1971). Thus, before a juror may testify as to his own verdict, a foundation for that testimony must be acquired by the court, other than by testmony volunteered by the jurors themselves.

The Court of Appeals concluded that the trial judge's possession of the notebook did not constitute evidence *aliunde.* We disagree. Following the trial, the foreman of the jury sent to the judge an extensive trial notebook, containing detailed testimony digests, charts, points of law (some incorrect), and even philosophical phrases. Such a detailed set of notes in the judge's possession constitutes more than a juror's admission or testimony as to possible misconduct. Rather, it is outside evidence which suggests the possibility of prejudice.

Apparently, the trial judge came to the same conclusion. After he received the notes, he notified all parties and all

members of the jury of his receipt of the notes, and held a [19] hearing to determine if the notes had an influence on the verdict. Each juror stated that his verdict was in no way influenced by the notes. No prejudice to appellants was affirmatively demonstrated. It is a long-standing rule of this court that we will not reverse a judgment because of the misconduct of a juror unless prejudice to the complaining party is shown. *Armleder v. Lieberman,* 33 OhioSt. 77 (1877). We find that the trial court did not err in denying a new trial, and overrule this proposition of law.

Appellant Mihalic's sixth proposition of law asserts that the trial court erred in excluding the proffered testimony of a defense witness who would have testified that Broeckel harbored ill will for Mihalic. Appellant asserts further that since such witness is the only direct evidence of such ill will, it cannot be said that the error was harmless beyond a reasonable doubt.

The evidence which Mihalic sought to introduce was the testimony of one Zimmerman who would have testified that in a conversation he had with Broeckel, Broeckel referred to Mihalic as a "rotten S.O.B." Broeckel had earlier testified that Mihalic was "a nice person." The state objected to Zimmerman's testimony on the ground that it was offered to impeach a prior inconsistent statement by Broeckel and that counsel for appellant failed to lay a proper foundation upon which Broeckel could later be impeached. The trial court sustained the objection.

Appellant contends here, as he did in the Court of Appeals, that the purpose of the testimony was not to impeach a prior inconsistent statement by Broeckel, but rather to demonstrate that Broeckel was prejudiced or biased towards Mihalic. We agree, as did the Court of Appeals. The impeachment of a witness by showing bias or prejudice does not require the foundation necessary for impeaching a prior inconsistent statement, and therefore the trial court should have allowed Zimmerman to testify.

The Court of Appeals concluded that this error was harmless beyond a reasonable doubt. After careful consideration, we agree. A defendant is not entitled to a perfect and [20] errorless trial, but he is entitled to a fair and impartial one. See *State v. Perryman*, 49 OhioSt.2d 14, 19, 3 O.O.3d 8, 11 (1976). No prejudicial effect sufficient to warrant a new trial was caused by this error. This proposition of law is overruled.

Appellant Mihalic's last proposition of law alleges that the trial court erred in admitting evidence of Mihalic's checking account without attempting to demonstrate that his net worth also increased during the period of the alleged crimes. Appellant asserts that in the absence of such a foundation, evidence of checking account activity is irrelevant.

This proposition is without merit. Clearly, considering the type of charges against Mihalic, evidence of bank activity is relevant and of probative value. Such evidence is certainly not conclusive; the jury is free to give it any weight it desires, or to disregard it. Appellant offered, in considerable detail, explanations and rebuttal evidence. It is not our function to act as a reviewing jury; we see no improper conduct or impermissible inferences. Proposition of law number seven is overruled.

Accordingly, the judgment as to both appellants is affirmed.

Judgment affirmed.

O'NEILL, C.J., HERBERT, CELEBREZZE, McCORMAC, P. BROWN, SWEENEY and LOCHER, JJ., concur.

McCORMAC, J., of the Tenth Appellate District, sitting for W. BROWN, J.

APPENDIX "B"

Opinion of the Court of Appeals, Cuyahoga County, Ohio, Eighth District

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
County of Cuyahoga

No. 34055

STATE OF OHIO,
APPELLEE

-vs-

DENNIS KEHN and PETER MIHALIC
APPELLANTS

APPEAL FROM COMMON PLEAS COURT
(Criminal)

No. 13224

DATE MAR 4 1976

JOURNAL ENTRY

This cause came on to be heard upon the pleadings and the transcript of the evidence and record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

On April 9, 1974, the Cuyahoga County Grand Jury returned a thirty-two (32) count indictment alleging that defendants-appellants, Peter Mihalic and Dennis Kehn, did, along with several unindicted co-conspirators, commit a series

of crimes during the period extending from March 27, 1971 to March 7, 1972. The unindicted co-conspirators named in the indictments were: Charles Broeckel, Phillip Christopher, Paul Sharaba, Herman Holly, Michael Ryan, Al Pannetta, William Whitcomb, Peter Sanzo, David Tiburzio, and James Testa. Not all of these men were alleged to have participated in each crime. Only Charles Broeckel and Phillip Christopher were named in all thirty-two (32) counts of the indictment.

Defendants appellants were arraigned on April 10, 1974, and on the following day, April 11, 1974, a pre-trial conference was held at which time the trial was set for June 4, 1974.

Sometime prior to May 10, 1974, appellants requested the State to furnish pre-trial discovery pursuant to Rule 16 of the Ohio Rules of Criminal Procedure. The State of Ohio had filed its own demand for discovery on May 6, 1974. On May 13, 1974, appellants filed a motion for a bill of particulars and a motion to compel disclosure of any negotiations with or promises of leniency to any of the State's witnesses. Subsequently, on May 23, 1974, appellants filed a second motion to compel discovery of the initial crime reports. The State filed written answers to all of appellants' motions and the Court held a hearing on the motions on May 28, 1974. As a result of the hearing on May 28, 1974, both of appellants' motions to compel discovery and their motion for a bill of particulars were granted. The Court ordered that the State was to comply with such orders by May 31, 1974.

An additional result of the May 28th hearing was that the trial date was reset to June 18, 1974. Defense counsel indicated at that time that a trial date of June 18th was acceptable (R. 37).

Appellants' third request for discovery was filed on June 7, 1974. This motion was granted. The date of the Court's order is not reflected in the record.

On June 11, 1974, Mr. Hanna, acting on behalf of both appellants, requested a continuance during a discussion in chambers. On Wednesday, June 12, 1974, Mr. Hanna placed

his request for a continuance on the record (R. 38-66). Appellants' request for a continuance was denied.

Thereafter on Tuesday, June 18, 1974, appellants' second request for a continuance was denied (R. 81).

On June 18, 1974, a panel of jurors was summoned and *voir dire* commenced. A jury of twelve and two alternates were duly sworn on Thursday, June 20, 1974.

On Monday morning, June 24, 1974, defense counsel again moved for a continuance. This motion was denied (R. 95) and the State's first witness was called in the afternoon of June 24th.

The State presented seventy-seven witnesses and numerous exhibits in support of its case. At the conclusion of the State's case, defendant Mihalic's motion for judgment of acquittal was granted as to Counts 1 through 9 and Counts 13 through 22. Thereafter, both appellants presented evidence in their own behalf.

The jury returned its verdict on July 26, 1974. Defendant Kehn was found guilty of Count 1 and Counts 4 through 32. Defendant Mihalic was found guilty of Counts 10 through 12 and Counts 23 through 32.

Thereafter, on August 5, 1974, the trial judge received a letter from the foreman of the jury, Mr. Tony Parete. Accompanying his letter, Mr. Parete forwarded a black spiral notebook containing the names and a synopsis of the testimony of each witness, a series of sheets which detailed each crime, and the testimony and exhibits offered in proof thereof, and another sheet containing general legal concepts. Mr. Parete's letter indicated that these items had been used by the jury in their deliberations.

The trial judge informed counsel for both sides of this communication and held a hearing on August 19th to determine whether the items forwarded by Mr. Parete were used in the deliberating room in such a manner as to deprive the defendants of a fair trial. The Court questioned each member of the jury with respect to their conduct in the deliberating room and requested counsel to submit briefs by August 22, 1974.

Defendants appellants filed a motion for a new trial on August 22, 1974. Thereafter, on August 23, 1974, the trial court overruled the motion stating that the jury's conduct during its deliberation upon the verdict was not prejudicial to the defendants and, therefore, did not constitute grounds for a new trial. Defendants appellants were then sentenced but were released on bail pending appeal.

Appellants filed a timely notice of appeal on September 19, 1974. Appellant Kehn has presented six assignments of error for our review. Appellant Mihalic, however, has presented eight assignments of error. The majority of appellant Mihalic's assignments of error raise the same issues as appellant Kehn and, therefore, Kehn's six assignments of error will be considered together with Mihalic's Assignments 1 through 5 and 8. Appellant Mihalic's sixth and seventh assignments of error will be considered individually.

Appellants' first assignment of error alleges that the trial court abused its discretion in denying appellants' request for a continuance. Appellants contend that they did not have adequate time to prepare their defense and, therefore, that the denial of their requests for a continuance constituted an abuse of discretion.

The granting or refusal of a continuance requested on the ground that an accused has not had sufficient time to adequately prepare for trial is a question which is addressed to the sound discretion of the trial court. *See Comerford v. State* (1873), 23 Ohio St. 599; *See State v. Findlay* (1973), 39 Ohio App. 2d 166, 173. The propriety of the Court's refusal of a continuance sought on the ground of lack of time for preparing the defense in a criminal case depends primarily upon the facts and circumstances of the particular case and a determination therefrom as to whether the accused was denied substantial justice by the refusal. *Ungar v. Sarafite* (1964), 376 U.S. 575, reh. den. (1964), 377 U.S. 925; *Avery v. Alabama* (1940), 308 U.S. 444. Furthermore, where an accused's lack of time to prepare for trial has had no adverse effect on the presentation of his defense, the refusal of a

continuance does not constitute prejudicial error. *See Peddersen v. State* (1960), 223 Md. 329, 164 A. 2d 539; *Cox v. State* (1955), 159 Neb. 811, 68 N.W.2d 497; *United States v. Simpson* (5th Cir. 1972), 460 F.2d 1321; *See Tasley v. United States* (8th Cir. 1971), 451 F.2d 394; *See Ford v. State* (1929), 121 Ohio St. 292, 301.

The facts of the instant case indicate that the original trial date of June 4, 1974, was set on April 11, 1974. Thereafter, on May 28th, the Court held a hearing on appellants' motions to compel discovery and for a bill of particulars. During the course of this hearing, the Court suggested June 10th or 11th as a alternate trial date. Upon further consideration, the Court inquired as to whether the date of June 17th or 18th would be agreeable to the defense. Counsel indicated at that time that a trial date of June 17th or 18th was agreeable to the defense.

Appellants' first request for a continuance was placed on the record on June 12, 1974. Defense counsel argued that late discovery, the amount of material produced thereby, and the large number of potential witnesses for the State necessitated a delay for further investigation by the defense. Appellants' request was denied. Subsequent requests on June 18th and June 24th were also denied (R. 81, 95).

The record discloses that defense counsel received a list of one hundred and six (106) potential State's witnesses on May 21, 1974. Sixty-seven (67) names on this original witness list were those of policemen. It should be noted that, although the trial was still set for June 4th when the original witness list was received, defense counsel made no request for a continuance prior to May 28th, when the Court moved the date of trial to a date beyond June 4th. During the period from May 21st to May 28th, the State supplemented its original witness list with forty-two (42) additional names. Thus, as of May 28th the defense was alerted to the fact that the State might call one hundred and forty-eight (148) witnesses in its case in chief. Thereafter, on June 14th the State added another eleven (11) witnesses to its list, thereby raising the total to one hundred and fifty-nine (159) witnesses.

A review of the transcript of proceedings reveals that the State called seventy-seven (77) witnesses in its case in chief. Much of the testimony of these witnesses was cumulative and consisted of testimony of the victims of the alleged crimes and the police officers who investigated the crimes. The State's chief witness was Charles Broeckel. Broeckel's testimony was the chief factor implicating the appellants. The record also discloses that various original crime reports, duty reports, and financial records were made available to the defense prior to trial. The last group of duty reports and financial reports was disclosed on Friday, June 14th. Thereafter, the trial commenced on June 18th with the impaneling of the jury; however, the first State's witness was not called until June 24th.

Appellants rely on *State v. Billington* (1974), 86 N.M. 44, 519 P. 2d 140, and *People v. Brown* (1973), 13 Ill. App. 3d 277, 300 N.E.2d 831, to support their argument that the denial of a continuance constituted an abuse of discretion. We have carefully examined these cases and found them to be distinguishable from the case at bar. In *State v. Billington, supra,* the divided court held that where the State's attorney on the day of trial moved to add to the list of witnesses the name of an important witness which the State had disclosed to defendants' attorney by telephone, the day before and, after questioning the witness for a few minutes, defendants moved for a continuance to obtain a deposition of the witness, the defendants were entitled to a continuance as a matter of law. The decision in *State v. Billington, supra,* turned on the the fact that under Rule 29 of the New Mexico Rules of Criminal Procedure the defendant, under certain conditions, had the right to take the deposition of any person and to use said deposition to impeach the State's witness on cross-examination at trial. An examination of *People v. Brown* also reveals that the particular facts of that case render it distinguishable from the present case.

Having carefully reviewed the record of the present case and upon considering the number of witnesses and exhibits

presented at trial, we conclude that the denial of appellants' requests for a continuance was *not* an abuse of discretion. The record indicates that defense counsel was given adequate time to prepare their defense and examine the witnesses and that defense counsel conducted themselves ably and with an acute awareness of the facts and circumstances of the instant case. Furthermore, there has been no showing that the denial of the continuances prejudiced appellants' defense. The first assignment of error is without merit and is overruled.

Appellants' second assignment of error contends that:

> The trial court erred in admitting into evidence a telephone number-address book, which the state claimed to be the property of an unindicted co-conspirator, wherein was found defendant-appellant Kehn's first name and telephone number, without any identification of the book or the handwriting therein.

From our review of the record, we conclude that the second assignment of error is without merit and is overruled.

The record indicates that appellant Kehn objected to the introduction of the telephone number-address book which contained the entry "Denny the cop 531-2407," or any portion thereof, because such was a private writing which could not be admitted without identification and authentication (R. 1761). Appellant Mihalic's counsel also objected to the admission of any items seized from the Christopher home (R. 1816). The record shows, however, that Detective Kovacic identified the exhibit (State's Exhibit 18), as the telephone number-address book which he removed from the home of Phillip Christopher in June of 1972. Kovacic stated that in his opinion the book appeared to be the same at trial as it did when he found it in 1972 and that from 1972 to the time of trial the book had been in the exclusive possession of the Federal Bureau of Investigation (R. 1770-72). We conclude that the testimony of Detective Kovacic with respect to the time of the seizure of the book and its location when seized was sufficient to identify and authenticate the writing so as to justify its admission into evidence. The State offered this

evidence to support the existence of a conspiracy between the appellant Kehn, Christopher and Broeckel. Kehn in return testified as to the manner in which his phone number could have legitimately found its way into that telephone number-address book. Thus, it was the jury's function as trier of the facts to weigh and evaluate all this evidence and to give it such weight, if any, as it deemed appropriate.

Appellants' third assignment of error contends that the trial court erred in refusing to admit business records of the Penn Central Railroad which tended to impeach the State's chief witness, Charles Broeckel.

Charles Broechel testified that Allan Pannetta had participated in the numerous burglaries referred to in his testimony. Appellants attempted to partially impeach Broeckel's testimony on this point by showing that Pannetta was working on March 28, 1971, April 17, 1971, and June 16, 1971. Appellants sought to so impeach Broeckel's testimony by admitting records of the Penn Central Railroad which apparently indicated that Pannetta was in fact working on the dates noted above. The trial court excluded the records for several reasons (R. 1982-84). One of the reasons given by the Court was the failure of John Shuss to properly qualify as either the maker of the records, the custodian of the records, or the person under whose supervision the records were made. R.C. 2317.40.

Upon close analysis of the business records as evidence statute, R.C. 2317.40, and the *voir dire* testimony of John Shuss, we conclude that the trial court properly excluded the Penn Central records.

Revised Code 2317.40 states that:

> As used in this section "business" includes every kind of business, profession, occcupation, calling, or operation of institutions, whether carried on for profit or not.
>
> A record of an act, condition, or event, in so far as relevant, is competent evidence if the custodian or the person who made such record or under whose supervision such record was made testifies to its identity and

> the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition, or event, and if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify its admission.
>
> This section shall be so interpreted and construed as to effectuate its general purpose to make the law of this state uniform with those states which enact similar legislation.

With respect to the records of March 28, 1971, the witness did not testify that he was the maker of the records, the custodian of the records, or the person under whose supervision the records were made. The records for April 17, 1971, were also properly rejected because Mr. Shuss offered no testimony as to the mode of preparation of those records. Exhibit No. A of the records of June 17, 1971, was properly refused because the witness offered no testimony as to the method whereby the time slip was prepared. Likewise, Exhibits B through O of the June 17th records were properly rejected because Mr. Shuss failed to testify that he was the maker, the custodian, or the person under whose supervision such records were made. Accordingly, we find that appellants' third assignment of error lacks merit.

Appellants' fourth assignment of error contends that:

> The Court erred in admitting into evidence State's Exhibit 10, a photostatic copy of a bank deposit slip, because it was not made under circumstances justifying its admission under the business records as evidence act.

For the reasons which appear below, we find that appellants' fourth assignment of error is not well taken.

State's Exhibit 10 was a photostatic copy of a deposit slip to the defendant Kehn's Cleveland Trust Account. Ray Messenger testified that he was the special records officer for Cleveland Trust Company and that his department was charged with custodial care of Cleveland Trust's records (R. 1653-54). Mr. Messenger identified Exhibit 10 as a copy or a deposit slip which was under his care and custody in the

normal course of business (R. 1657). Messenger stated that the deposit slip indicated a deposit of "140.00 cash" on May 25, 1972, and that the figures indicating the amount of the deposit appeared opposite the notation of "coin" on the deposit slip (R. 1658). Messenger further indicated that the deposit slip bore the names of Dennis and Janeen Kehn and the account number of 00304-0718 (R. 1658-59).

We conclude that State's Exhibit 10 was properly qualified under R.C. 2317.40 and was, therefore, properly admitted into evidence. Neither defendant suffered any prejudice from the admission of this exhibit. The record indicates that defendant Kehn offered an explanation with respect to State's Exhibit 10 and thus the jury was again given the choice of either accepting or rejecting the inference intended by the State or adopting the explanation of the defendant.

Appellants' fifth assignment of error alleges that the trial court erred in refusing to direct verdicts of acquittal in their favor since the State's case was predicated upon the testimony of an alleged accomplice uncorroborated by other evidence. Appellants contend that R.C. 2923.03(D), as effective January 1, 1974, applies to the case at bar and, therefore, they could not have been convicted of complicity solely upon the testimony of Charles Broeckel because his testimony was unsupported by other evidence.

Appellants' fifth assignment of error is without merit for several reasons.

Appellants' reliance of R.C. 2923.03(D) is misplaced. That section became effective on January 1, 1974, and provides that:

> (D) No person shall be convicted of complicity under this section solely upon the testimony of an accomplice, unsupported by other evidence.

It is immediately apparent that the crime with which both defendants were charged were committed in 1971 and 1972 and, thus, prior to the effective date of R.C. 2923.03(D). Section 3 of Amended Substitute House Bill 511 provides that persons charged with other than a capital offense

committed prior to January 1, 1974, are to be prosecuted under the law as it existed at the time of the offense. Under the authority of Section 3, therefore, it is apparent that appellants were to be prosecuted under the law as it existed prior to January 1, 1974. The law in Ohio, prior to January 1, 1974, with respect to the issue of corroboration of an accomplice's testimony, was summarized as follows in *State v. Flonnory* (1972), 31 Ohio St. 2d 124:

> A conviction may be based upon the uncorroborated testimony of an accomplice, except where otherwise specifically provided by statute.

Thus, prior to 1974, an accomplice's testimony only needed to be corroborated in prosecutions for perjury (former R.C. 2945.62), seduction (former R.C. 2945.63), and treason (former R.C. 2945.60 and 2945.61). We conclude, therefore, that given the dates of the offenses with which the appellants were charged and given the provisions of Section 3 of House Bill 511, the issue of corroboration in the case at bar was controlled by *State v. Flonnory, supra,* and, thus, the trial court properly denied appellants' motions for acquittal.

Appellants' fifth assignment of error is without merit for the additional reason that the testimony of Broeckel was in fact corroborated in many instances. The references alluded to by the Court below are merely representative instances of corroboration and are not meant to serve as a complete review of all the corroborated testimony.

The Sidney's Men's Wear store at 18225 Euclid Avenue was burglarized on September 5, 1971. Charles Broeckel testified that Kehn was not going to participate in this particular robbery, but that Mihalic would take Kehn's place (R. 962). Broeckel further testified that he and his companions jumped the alarm on the premises and picked the lock on the front door. Broeckel stated that, during this time, Mihalic was parked on Euclid Avenue in close proximity to the store and that it was his job to back off any cars which approached the scene or radio the burglars in the building in the event a call about the robbery came over the police radio. Broeckel stated

that Mihalic warned the burglars via the radio several times that evening (R. 964). Broeckel further testified that he spoke to Mihalic during the course of the burglary and that Mihalic pulled off the radiator hose of his patrol car in response to Broeckel's question as to how Mihalic was going to justify the length of time during which his patrol car remained stationary (R. 966).

Broeckel's testimony on the Sidney's Men's Wear burglary was corroborated in several respects. Patrolmen Rojc and Bozich indicated that as they drove into the Euclid-Green Shopping Center at approximately 2:15 a.m., they were approached by Mihalic and told that the Shopping Center was secure (R. 380). This evidence corroborated Broeckel's testimony with respect to Mihalic's function and with respect to his testimony that Mihalic warned the burglars of approaching vehicles. Furthermore, Broeckel's testimony with respect to the length of time Mihalic spent in the vicinity of the store and the nature of his mechanical difficulty was corroborated by Mihalic's own duty report for September 5, 1971 (R. 2976), and the Cleveland Police repair order for Mihalic's vehicle (R. 2977). Broeckel's own presence in the vicinity of the scene was corroborated by a paper boy who noted some suspicious activity at 5:30 a.m. near a parked Cadillac whose license plates were listed to Broeckel (R. 1412, 1418-19).

Broeckel's testimony with respect to the burglaries of the Stakich Realty Company and the Superior Savings and Loan Association was corroborated by the testimony of Raymond and Vitalya Butkus, Kehn's duty report for January 17, 1972, and the testimony of Lieutenant Cousino.

Appellant Mihalic's sixth assignment of error alleges that the trial court erred in refusing testimony which would have demonstrated that the state's only witness harbored ill will for defendant appellant Mihalic.

During the cross-examination of Charles Broeckel, the witness denied ever conversing with James Zimmerman in connection with testifying against policemen (R. 1157) and stated that he thought the defendants were nice persons.

Thereafter, during Mihalic's case in chief, defense counsel called James Zimmerman to the witness stand. Zimmerman testified that on one occasion he was in a bar with Broeckel when the defendants came in. Zimmerman started to testify as to what Broeckel said on that occasion, but the State objected and the testimony was not allowed. Mihalic's counsel made a proffer into the record that, if allowed to testify, Zimmerman would have stated that Broeckel called the defendants "... no good rotten SOB's or something to that effect" (R. 2783). Mihalic's counsel indicated that the testimony was offered to impeach Broeckel's testimony that he liked Mihalic. Kehn's counsel pointed out that Broeckel also denied having any conversation with Zimmerman (R. 2786). At trial, the State's objection was based on the failure of defense counsel to lay a proper foundation whereby the witness could later be impeached by his prior inconsistent statement.

On appeal, appellant Mihalic contends that the testimony of Zimmerman was admissible to demonstrate the prejudice of the State's Chief Witness, Broeckel.

It is well settled that impeachment of a witness by use of a prior inconsistent statement requires that a proper foundation be laid on cross-examination. Thus, in order to impeach a witness by his prior inconsistent statement, counsel must, during his cross-examination of the witness, direct his attention to the substance of the prior statement, the time when the inconsistent statement was made, the place where the statement was made, and the person to whom and in whose presence the statement was made. Absent such a foundation, the prior inconsistent statement may not be used. The impeachment of a witness by showing his or her bias or prejudice does not, however, require such a foundation.

From our review of the record, we conclude that defense counsel merely sought to show Broeckel's prejudice and thus no foundation was necessary. We conclude, therefore, that, although the exclusion of Zimmerman's testimony constituted error, on the record of the present case, the error is harmless

beyond a reasonable doubt. Accordingly, appellant's sixth assignment of error is overruled.

In the seventh assignment of error appellant Mihalic contends that:

> The trial court erred in permitting the State to introduce records of defendant-appellant Mihalic's bank accounts without demonstrating the relevance of these documents.

Upon our review of the record, we conclude that appellant Mihalic's seventh assignment of error lacks merit. The trial court properly exercised its discretion in allowing the banking records of the appellant into evidence. The relevance of the documents was readily apparent given the offenses with which Mihalic was charged. As noted by the appellee, the general rule recognizes that:

> . . . where a defendant is charged with a crime which is of such a nature that the acquisition of money may be regarded as a natural result of its perpetration, and there is other evidence of the accused's guilt, evidence of the defendant's sudden acquisition of money, or of a marked improvement in his financial condition at or subsequent to the time of the commission of the offense, is admissible, although the source of the money is not definitely traced. 91 ALR 2d 1046, 1048.

The above-quoted position has been adhered to in Ohio. *See State v. Nevius* (1947), 147 Ohio St. 263. Furthermore, appellants' fear that the admission of such evidence would allow the jury to make an inference upon an inference is unfounded and any such temptation was clearly removed by the court's instructions directing the jury that they could not make one inference from another inference (R. 2852).

Kehn's sixth and Mihalic's eighth assignments of error contend that:

> The trial court erred in refusing to grant defendants-appellants motion for new trial based upon the misconduct of a juror who had taken notes during the trial and brought the notes into the deliberations.

It is well settled that the denial of a motion for a new trial based upon the misconduct of a juror will not be reversed on appeal absent a showing that the trial court abused its discretion. *Pearson v. Gardner Cartage Co.* (1947), 148 Ohio St. 425; *Maggio v. Cleveland* (1949), 151 Ohio St. 136, 144; *Weaver v. Gale* (App. 1949), 56 Ohio L. Abs. 178. In addition, it is established that absent a showing of prejudice to the complaining party, a judgment will not be reversed because of the misconduct of a juror. *Armleder v. Lieberman* (1877), 33 Ohio St. 77. Thus, despite the misconduct of one juror, a case may nevertheless be free of prejudicial error when the remaining jurors indicate that they were not influenced by anything that the one juror might have done. *Cleveland Ry. Co. v. Haycox* (App. 1923), 1 Ohio L. Abs. 330.

The facts of the present case indicate that a juror, who was later selected as the foreman of the jury, kept a daily record, from memory, of the testimony of all but two of the witnesses. These notes were taken either at the juror's home or on his bus ride home from the Court House. The notes were made only by one juror and he did not make them in the courtroom (SR 17-18).

The juror also made an extensive series of notes connecting the testimony given by various witnesses to specific crimes charged. In these sheets, the juror identified the specific crime involved, the witnesses' names and their testimony in relation to that crime, any coincidences or discrepancies in the witnesses' testimony, and any exhibits offered in proof of that particular crime. The juror stated that a rough draft of the sheets designating the various crimes had been originally prepared by him at his home, but that the sheets as they appeared in their final form contained additions and deletions and represented the work product of the entire jury (SR 19-20).

The final set of notes made by the juror consisted of a sheet of paper containing various broad legal concepts and definitions. This sheet of notes was prepared by the juror

during the first or second week of the trial outside of the courtroom or the jury room (SR 10, 22).

As noted previously, the existence of these notes was brought to the court's attention by the juror's voluntary disclosure *after* the jury had rendered their verdict. Thereafter, the trial court notified all parties involved and held a hearing on August 19th.

At the hearing on August 19th, the trial court indicated that, although the juror's letter in no way impeached the jury's verdict, it nevertheless was of the opinion that in the interest of justice and caution it was obligated to determine whether the notes and papers were used in a manner which deprived the appellants of a fair trial and whether the existence of such notes and papers constituted evidence *aliunde* (SR 5-6). Thereafter, the court called the juror who had volunteered the information and inquired as to time and method whereby the notes were prepared as well as to what extent the material was used during the jury's deliberations. The court also called each of the other members of the jury in an effort to determine what effect, if any, the notes had on the decision reached by each juror individually (R. 45-66). Each of the other members of the jury testified under oath that the notes had no effect on his or her individual verdict.

On August 23, 1974, the trial court entered the following order overruling appellants' motion for a new trial.

> Upon consideration of testimony of members of jury adduced in a hearing, August 19, 1974, and consideration of the law, it is ruled by this court that the conduct of the jury during it's (sic) deliberation upon a verdict was not prejudicial to the defendant, and therefore, does not constitute grounds for a new trial.

From our review of the material volunteered to the trial court by the juror and of the transcript of proceedings recorded at the hearing of August 19th, we conclude that the trial court properly overruled appellants' motion for a new trial.

In order to resolve the issue presented by appellants' last assignment of error, this court was required to consider three related issues: (1) The taking of trial notes by a juror; (2) the use of trial notes in jury deliberations; and (3) the evidence necessary to impeach a jury's verdict.

In general, the subject of whether the taking of trial notes by a juror is proper is an issue on which the authorities are in disagreement. 14 ALR 3d 831, 834. Nevertheless, there is authority in this state which recognizes that the making and use of trial notes by a juror may not constitute misconduct and may be proper and desirable in certain cases. *See Corbin v. Cleveland* (1944), 144 Ohio St. 32; *W.H. Davis Die Co. v. Beltzhoover Electric Co.* (1931), 40 Ohio App. 308; *See Cleveland, C.C. & St. L. Ry. Co. v. Ullom* (1898), 20 Ohio C.C.R. 512.

Closely related to the issue of jurors taking notes is the issue of what effect results from the jury's *use* of such notes during its deliberations. In some cases, the prejudicial effect of a juror's note taking has been deemed to depend on the eventual use made of the notes and, therefore, absent a showing that the juror made some *effective* use of the notes himself or as a persuasive force with his fellow jurors, a reversal based on improper taking and use of juror's notes would be unwarranted. 14 ALR 3d 831, 834, 848.

The facts of the case at bar indicate that prior to opening statements the court gave the jury the following admonition:

> You are not permitted to take notes or ask any question during the course of trial. Therefore, again, you can see that it is vitally important that you pay strict attention. (R. 96)

Thereafter, at the hearing on August 19th, the trial court indicated that the juror's conduct did *not* contravene the court's order because the notes were *not* made in the courtroom (SR 39). Thus, assuming the taking of the notes did not violate the court's order, it must be considered whether their use in the jury room was prejudicial to the appellants.

From our review of the supplemental transcript of proceedings, we conclude that the use in the jury room of the notebook and sheets listing the testimony relating to each crime did not prejudice the appellants. The record fails to disclose that Parete himself made some *effective* use of the notes during the deliberations or was able to use them in such a way as to persuade his peers. As noted previously, each of the other eleven jurors testified under oath that they reached their individual verdicts independent of the notes in question.

We also conclude that the presence in the jury room of the paper containing the legal concepts and definitions did not operate to the prejudice of the appellants. There is nothing in the record to indicate that the jurors relied on this information, and it is indeed highly unlikely that they did, given the fact that the court's written instructions were in the jury's possession during their deliberations (R. 2916) and given the court's final instructions in all instances" (R. 2918).

The third related issue considered by this court in resolving appellants' final assignment of error concerned the issue of what kind of evidence is necessary to impeach a jury's verdict.

It is well established that the verdict of a jury may not be impeached by the testimony or affidavits of a member of a jury rendering a verdict unless there is evidence *aliunde* impeaching the verdict. *Farrer v. State* (1853), 2 Ohio St. 54; *Holman v. Riddle* (1858), 8 Ohio St. 384; *Kent v. State* (1884), 42 Ohio St. 426; *See Corrigan v. Rockefeller* (1902), 67 Ohio St. 354; *Schwindt v. Graeff,* (1924), 109 Ohio St. 404; *Lund v. Kline* (1938), 133 Ohio St. 317; *Wicker v. Cleveland* (1948), 150 Ohio St. 434; *Diehl v. Wilmot Castle Co.* (1971), 26 Ohio St. 2d 249; *Hutchinson v. Laughlin* (1951), 90 Ohio App. 5. Thus, before a juror may testify to impeach his own verdict, a foundation must be acquired by the court by means *other than* information volunteered by the jurors themselves.

As defined in *Black's Law Dictionary* (4th ed.), evidence *aliunde* is "Evidence from outside, from another source. In certain cases a written instrument may be explained by

evidence *aliunde*, that is, by evidence drawn from sources exterior to the instrument itself, ..." The recent case of *Diehl v. Wilmot Castle Co., supra,* provides a good example of evidence *aliunde.* In *Diehl,* the testimony of the husband of a juror that he and his wife, during the course of a trial in which she was serving as a juror, went to the scene of the accident and reenacted the accident which was the subject of the lawsuit, was held to constitute evidence *aliunde* of juror misconduct which could be used to impeach the jury's verdict.

The rule that absent evidence *aliunde* the verdict may not be impeached by the testimony or affidavit of a juror is particularly adhered to when a party seeks to impeach a verdict on the grounds of misconduct on the part of the juror or his fellow jurors. *Farrer v. State, supra; Schwindt v. Graeff, supra; Emmert v. State* (1933), 127 Ohio St. 235; *Wicker v. Cleveland, supra.* Therefore, although a particular act of jury misconduct may constitute a ground for a new trial, jury misconduct which would vitiate the jury's verdict cannot, nevertheless, be shown by the testimony or affidavits of any juror, absent the prior establishment, by evidence *aliunde,* of a prima facie case of misconduct. *Holman v. Riddle, supra; Corrigan v. Rockefeller, supra.*

We conclude that the evidence volunteered to the court by the juror Parete was not competent evidence to impeach the jury's verdict. Although the notes prepared and presented to the court by Parete were not in the form of an affidavit or testimony and thus technically could be distinguished from the general case, we conclude that in the present case any such distinction would be a distinction without a difference. Essentially the matter presented to the court consisted of notes prepared by Parete outside the courtroom or the jury room and notes, prepared in the jury room, which represented the collective product of the entire jury. All the evidence presented to the court had its source either in one or all of the jurors. Thus, the only knowledge the court had that such notes were taken and used in deliberations was from the

jurors themselves. Given the evidence presented to the trial court, for the court to have granted appellants' motion would have been tantamount to rejecting the "... generally accepted doctrine, founded upon the 'wisest reasons,' of public policy, ... that the verdict of a jury may not be impeached by the testimony or affidavits of a member or members of the jury rendering the verdict, unless there is evidence *aliunde* impeaching the verdict." *Wicker v. Cleveland, supra,* at 436. As stated in *Hutchinson v. Laughlin:*

> In reaching our conclusion in the instant case, we reaffirm the wisdom of the rule against impeachment of the verdict of a jury by testimony of one of its members, unless corrobating testimony is produced from sources other than the deliberations in the jury room. This time-hallowed rule of common law is founded in common sense which should have strong present appeal. If we were to disregard this traditional principle or to undermine it by successive or progressive exceptions, we should be contributing to the undermining rather than the strengthening of our jury system, which, despite its occasional demonstrations of human frailties, remains one of the bulwarks of protection for free men today. Jurors, after completion of their duties at the court-house, would be increasingly importuned and harrassed in their homes after their deliberations were terminated and, instead of acceptance being the usual sequel to a verdict, visitation of jurors would tend to become the necessary practice of diligent counsel. Jurors would likewise be placed on the defensive because of their casual opinions and hampered in their free discussion on the jury room. The obtaining of public-spirited citizens to serve as jurors would become more difficult than at the present time. 90 Ohio App. at 15-16.

In summary, we note that with respect to appellants' last assignment of error we find that the trial court properly denied the motion for a new trial. The evidence presented to the trial court was not evidence *aliunde* of juror misconduct and, furthermore, assuming the evidence was properly receivable to impeach the jury's verdict, there was no showing that the taking and using of the notes by the jury prejudiced appellants' case in any manner.

The appellants' sixth and eighth assignments of error are without merit and are overruled.

The judgment of the trial court is affirmed.

It is ordered that appellee recover of appellant(s) its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

DAY, P.J., (CONCURS IN PART, DISSENTS IN PART AND CONCURS IN THE JUDGMENT.) (See attached.)
PARRINO, J. and
*SILBERT, J. CONCUR.

/s/ Jack G. Day
PRESIDING JUDGE

(*J. Silbert, Retired Judge of the 8th District, sitting by assignment in the 8th Appellate District.)

For plaintiff appellee: John T. Corrigan; Albin Lipold, Jos. Gibson
For defendants appellants: Harry A. Hanna, Gerald Gold

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

RECEIVED FOR FILING
MAR 4 1976
GERALD E. FUERST
By

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

No. 34055

State of Ohio
PLAINTIFF-APPELLEE

-vs-

Dennis Kehn & Peter Mihalic
DEFENDANTS-APPELLANTS

DATE MAR 4 1976

APPEAL FROM COMMON PLEAS COURT

No. 13224 Cr.

JOURNAL ENTRY

DAY, J., CONCURRING IN PART, DISSENTING IN PART, AND CONCURRING IN THE JUDGMENT:

I concur in the judgment despite misgivings with respect to the trial court's refusal to grant the defense a further continuance in the face of the volume and interval scheduling of the discovered documents and names of witnesses.[1] I have concluded that this error, if error at all, was harmless in the light of the total evidence.

In this case, however, there is a unique problem.[2] That is, whether the record contains sufficient evidence aliunde to allow impeachment of a verdict by a juror's own testimony or affidavit. I venture an examination of this special problem

[1] See Tr. 72-79 for a description of the volume and complexity of discovered materials and difficulty of preparation.

[2] No cases have been found or called to the court's attention whose facts approximate those in the present case.

from the prospective I deem necessary to a proper application of the aliunde doctrine even though that application, if made, would have no effect on the verdicts here.[3]

There can be little question of the merit of the objectives of the aliunde rule. Obviously, jurors should not be "importuned or harassed" to disclose the basis for their decision by anyone, anywhere. They ought not suffer either the bother or embarrassment of defending their verdicts. Even the prospect of inquiry is a potential chill on the freedom of deliberation that the law will not tolerate. Safeguards against such hassle are necessary. They are promoted by the aliunde rule. Nonetheless, the aliunde rule itself is an exception demonstrating that the rule against impeachment is not absolute. And upon analysis, the clear rationale for the rule is to render verdicts invulnerable to challenge from forces outside the jury except in unusual circumstances. The standard that a juror cannot impeach his own verdict by a response to interrogation with or without compulsion, absent evidence aliunde, is a reaction to that rationale. But it is clear that a juror may take action which, if observed by another, will generate such evidence providing the foundation for impeachment by the jurors themselves, see *Diehl v. Wilmot Castle Co.* (1971), 26 Ohio St. 249, 250-251.[4]

[3] Assuming evidence of misconduct aliunde can be established, reversal is not the consequence unless the trial court abused its discretion in overruling a motion for new trial, *Pearson v. The Garcher Cartage Co.* (1947), 148 Ohio St. 425, 445, 449; cf. *Maggio v. Cleveland* (1949), 151 Ohio St. 136 at 144 and clearly Ohio law would not support a conclusion of abuse when "substantial justice" is done, *Maggio v. Cleveland, id.* That standard is met when *no* improper effect on the jurors' judgment is shown, *Armleder v. Lieberman* (1877), 33 Ohio St. 77, 84. *Armleder* involved a civil suit and the opinion referred at least twice to a rule in a "civil" trial (pp. 82 and 84) in a context which would allow an inference that a different rule might apply in a criminal case. However, the court in *Armleder* did not announce a distinctive standard for a criminal case. Applying these principles to the instant, it is a crucial fact that the court examined the jurors and all disavowed any effect on their judgments.

[4] In *Diehl* a juror's husband testified to his wife's going to the scene of an accident to re-enact it. This provided the evidence aliunde.

In the present case the foreman took materials consisting of notes, a legal outline, philosophical extracts, and evidential charts[5] into the jury deliberations. This was clearly improper. Later he delivered the offending materials to the court. Was this not evidence aliunde in the same sense as the same materials would be if retrieved by an outsider who observed the foreman throw them into a waste basket? Was not the judge himself in as good position as the husband in *Diehl* to provide the aliunde evidence? Finally, and most importantly, would a decision that the revelatory circumstances here constituted evidence aliunde be a precedent undermining the present rules protecting jurors from pressure? The first two questions require an affirmative answer and the last a negative. Moreover, treating the circumstances of revelation in this case as aliunde would be a step toward protecting future juries against improper intrusions on their deliberations. If one were to rank jury protection priorities, defense against alien intrusions of the kind exemplified here would have to be high on the list.

Accordingly, I would hold that the necessary evidence aliunde has been established in this case but affirm because the examination of the jurors by the court resulted in the conclusion that their individual judgments were unaffected.[6]

---

[5] According to the testimony of the jury foreman some of the written material was produced by a joint effort "with the group" (The State of Ohio's Supplement to Defendant's Supplemental Transcript of Proceedings, pp. 24-26).

[6] (The State of Ohio's Supplement to Defendant's Supplemental Transcript of Proceedings, pp. 46-68).

APPENDIX "C"

Judgment of Convictions – Court of Common Pleas of Cuyahoga County, Ohio

STATE OF OHIO
CUYAHOGA COUNTY

STATE OF OHIO

Plaintiff

vs.

Dennis Kehn

Defendant

IN THE COURT OF COMMON PLEAS

APRIL Term, 1974
To-wit August 23, 1974, 19

No. CR-13224

INDICTMENT Burglary w/cts Forcing Entry into Safe w/cts Larceny w/cts Auto Stealing w/cts Assault w/Deadly Weapon, w/cts Unlaw. Entry into Financial Inst. w/cts Larceny of Financial Inst.

JOURNAL ENTRY

Now comes the Prosecuting Attorney on behalf of the State and defendant, Dennis Kehn was brought into Court, represented by counsel.

Upon consideration of testimony of members of Jury adduced in a hearing, August 19, 1974, and consideration of the law, it is ruled by this Court that the conduct of the Jury during it's deliberation upon a verdict was not prejudicial to the defendant, and therefore, does not constitute grounds for a New Trial.

Whereupon, defendant on a former day of Court, having been found guilty by a Jury of counts, 1-4-5-6-7-8-9-10-11-12-13-14-15-16-17-18-19-20-21-22-23-24-25-26-27-28-29-30-31 & 32, was this day inquired of if he had anything to say why judgment should not be pronounced against him and he having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced.

It is, therefore, ordered and adjudged by the Court that defendant, Dennis Kehn, be imprisoned and confined in the Southern Ohio Correctional Facility, Lucasville, Ohio, under each count, according to law and that he pay the costs of this prosecution for which execution is awarded.

Sentence as to counts, 1-4-6-7-9-10-11-12-13-15-17-18-19-20-21-22-23-25-26-30-31 & 32, to be served for a period of one (1) to five (5) years, on each count. On each of the 5th, 8th, 14th, 16th, 24th, 27th, and 29th counts, for a period of one (1) to ten (10) years, on each count. Sentence on counts, 1-4-7-10-13-15-23-& 28, to be served consecutive to each other and sentences for remaining counts shall be served concurrently with each other and with counts previously enumerated, all according to law.

The Court advised defendant of his right to Appeal and as to all other rights afforded defendant pursuant to Criminal Rule 32(A-2).

Execution of sentence stayed pending Appeal.
Original bond continued during Appeal.

FILED
COURT OF COMMON PLEAS
SEP 3 1974
EMIL J. MASCAY
CLERK OF COURTS
CUYAHOGA COUNTY, OHIO

David T. Matia, Judge

va
8/26

THE STATE OF OHIO
Cuyahoga County } ss.
I, GERALD E. FUERST, CLERK OF THE COURT OF COMMON PLEAS, WITHIN AND FOR SAID COUNTY,
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY
MAY 19 1976
GERALD E. FUERST, Clerk
By
Deputy

STATE OF OHIO
CUYANHOGA COUNTY

STATE OF OHIO
Plaintiff

vs.

Peter Mihalic
Defendant

IN THE COURT OF COMMON PLEAS

APRIL Term, 1974
To-wit August 23, 1974

No. CR-13224

INDICTMENT Burglary w/ct Forcing Entry into Safe w/cts Larceny w/cts Auto Stealing w/cts Assault w/Deadly Weapon w/cts Unlaw. Entry into Financial Inst. w/cts Larceny Financial Inst.

JOURNAL ENTRY

Now comes the Prosecuting Attorney on behalf of the State and defendant, Peter Mihalic was brought into Court, represented by counsel.

Upon consideration of testimony of members of Jury adduced in a hearing August 19, 1974, and consideration of the law, it is ruled by this Court that the conduct of the Jury during it's deliberation upon a verdict was not prejudicial to the defendant, and therefore, does not constitute grounds for a New Trial.

Whereupon defendant on a former day of Court, having been found guilty by a Jury of counts, 10-11-12-23-24-25-26-27-28-29-30-31 & 32, was this day inquired of if he had anything to say why judgment should

not be pronounced against him and he having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced.

It is, therefore, ordered and adjudged by the Court that defendant, Peter Mihalic be imprisoned and confined in the Southern Ohio Correctional Facility, Lucasville, Ohio, under each count, according to law, and he is to pay the costs of this prosecution for which execution is awarded.

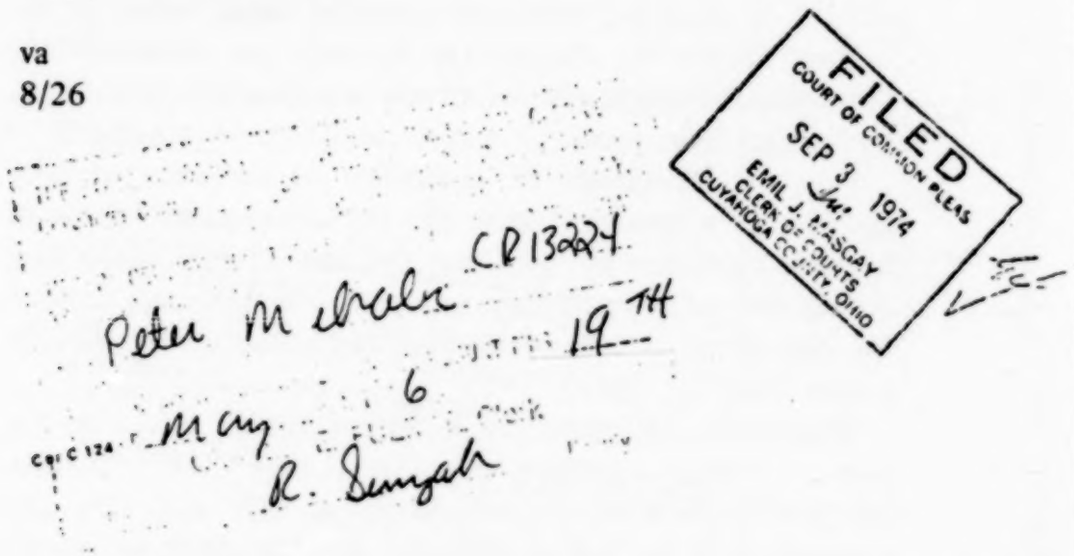
Sentence as to counts, 10-11-12-23-25-26-28-30-31- & 32, to be served for a period of one (1) to five (5) years, as to each count. On each of the 24th, 27th and 29th counts, for a period of one (1) to ten (10) years. Sentence imposed on counts, 10-23-& 28, to run consecutive to each other, and sentences imposed for the remaining counts shall be served concurrently with each other and with the counts previously enumerated, all according to law.

The Court advised the defendant of his right to Appeal and as to all other rights afforded him pursuant to Criminal Rule 32(A-2).

Execution of sentence stayed, pending Appeal.
Original bond continued during Appeal.

David T. Matia, Judge

va
8/26



PROOF OF SERVICE

I, Jeffrey W. Largent, one of the attorneys for petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 19th day of July, 1977, I served copies of the foregoing Petition for a Writ of Certiorari to the Supreme Court of Ohio on the following parties thereto:

1. On the State of Ohio by mailing three copies thereof in a duly addressed envelope, with first class postage prepaid, to William J. Brown, Attorney General for the State of Ohio, 30 East Broad Street, Columbus, Ohio 43215.

2. On John T. Corrigan, Prosecuting Attorney for the County of Cuyahoga, Ohio by mailing three copies thereof in a duly addressed envelope with first class postage prepaid, to his office in The Justice Center, 1200 Ontario, Cleveland, Ohio 44113.

/s/ Jeffrey W. Largent
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Suite 1308, 33 Public Square
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(216) 771-4050

Supreme Court, U. S.
FILED
AUG 16 1977
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1977

No. 77-102

DENNIS KEHN AND PETER MIHALIC,
Petitioners,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF OF RESPONDENTS IN OPPOSITION

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Supreme Court of the United States

October Term, 1977

No. 77-102

DENNIS KEHN AND PETER MIHALIC,
Petitioners,

vs.

THE STATE OF OHIO,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE OHIO SUPREME COURT

BRIEF OF RESPONDENTS IN OPPOSITION

TO: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question which would require this Court to review this case.

The questions herein presented were all raised in the trial court, the Court of Appeals for Cuyahoga County, Ohio, and the Supreme Court of Ohio. The jury in the trial court found the petitioner Dennis Kehn guilty of 30 felonies and the petitioner Peter Mihalic guilty of 13 felonies. The Court of Appeals and the Supreme Court of Ohio both affirmed the judgments of the trial court.

The Ohio courts decided this case in accordance with the statutes and Constitution of the State of Ohio, and the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is therefore presented by the petition for certiorari.

COUNTER QUESTIONS OF LAW

1. A judgment will not be reversed because of misconduct of a juror, in making and use of notes, unless prejudice to the complaining party is shown.

2. The *Chapman* rule applies only to the test of harmlessness when there is a constitutional error, and has no application in deciding whether such an error exists.

3. Supreme Court Rule 40(1)(d)(2) which provides in part that, "Questions not presented according to [the requirements of this rule] will be disregarded, save as the Court, at its option, may notice a plain error not presented," does not apply to questions presented on a Petition for Writ of Certiorari since the entire trial record is not available to the Court for examination.

STATEMENT OF THE CASE

The petitioners, Dennis Kehn and Peter Mihalic were both indicted by the Grand Jury of Cuyahoga County on April 9, 1974. The indictment charged that both Dennis Kehn and Peter Mihalic did, along with a group of unindicted conspirators, commit thirty-two separate felonies. The unindicted conspirators named in the indictments were: Charles Broeckel, Philip Christopher, Paul Sharaba, Herman Holly, Michael Ryan, Al Panetta, William Whitcomb, Peter Sanzo, David Tiburzio and James Testa. Not

all of these men were alleged to have participated in each crime. However, Charles Broeckel and Philip Christopher were named in all thirty-two counts of the indictment.

Dennis Kehn and Peter Mihalic were both charged with committing the following crimes: (1) unlawful entry of financial institution, Ohio Revised Code, Section 2907.141(B) on March 28, 1971 of Cleveland Federal Savings & Loan Assn.; (2) burglary, Ohio Revised Code, Section 2907.10, and (3) larceny of a .38 caliber revolver and money of the value of $75 on June 14, 1971, Gale's Bi-Rite Super Market; (4) burglary, Ohio Revised Code, Section 2907.10; (5) forcing entry into safe, Ohio Revised Code, Section 2907.12, and (6) larceny of Eagle Stamps of the value of $913 and money of the value of $11,000, Ohio Revised Code, Section 2907.20, on June 17, 1971 of Pick-N-Pay Store No. 35, (7) burglary, Ohio Revised Code, Section 2907.10, (8) forcing entry into safe, Ohio Revised Code, Section 2907.12, and (9) larceny of jewelry of the value of $23,078.39, Ohio Revised Code, Section 2907.10, on June 27, 1971 of Alvin's Jewelers, Richard Schreibman, owner; (10) burglary, Ohio Revised Code, Section 2907.20, (11) larceny of men's clothing of the value of $20,855, Ohio Revised Code, Section 2907.10, of Sidney's Men's Wear on September 5, 1971; (12) auto stealing, Ohio Revised Code, Section 4549.04(A) 1962 Ford truck, the property of Silvio Panichi on September 5, 1971; (13) burglary, Ohio Revised Code, Section 2907.20, and (14) attempted entry into safe, Ohio Revised Code, Section 2907.12 on September 24, 1971 of Pick-N-Pay Super Market; (15) burglary, Ohio Revised Code, Section 2907.10, (16) forcing entry into safe and (17) larceny of $45,297.28, Ohio Revised Code, Section 2907.20, on December 20, 1971 of Uncle Bill's and aggravated assault, Ohio Revised Code, Section 2901.241, on December 20, 1971 of (18) Judith

Dressler, (19) David Kozlowski, (20) Charles McGrue, (21) Danny Skiljan and (22) Loretta Richards; (23) burglary, Ohio Revised Code, Section 2907.10, and (24) forcing entry into safe, Ohio Revised Code, Section 2907.12, on January 17, 1972 of Stakich Realty; (25) unlawful entry of financial institution, Ohio Revised Code, Section 2907.141(B), (26) larceny of financial institution $96,811.16, Ohio Revised Code, Section 2907.142 and (27) forcing entry into safe, Ohio Revised Code, Section 2907.12 of Superior Savings and Loan Association on January 17, 1972; (28) burglary, Ohio Revised Code, Section 2907.10, (29) forcing entry into safe, Ohio Revised Code, Section 2907.12, and (30) larceny of money $26,200, Ohio Revised Code, Section 2907.20 on March 7, 1972 of Cleveland Industrial Vending Co.; (31) aggravated assault, Ohio Revised Code, Section 2901.241, of Randall Keen on March 7, 1972; and (32) auto stealing, Ohio Revised Code, Section 4549.04(A), of 1971 Ford truck of Cleveland Industrial Vending Co. on March 7, 1972.

Trial to a jury commenced on June 18, 1974 as to both defendants. At the conclusion of the State's case, counts 1 to 9 and 13 to 22 were dismissed by the court as to Peter Mihalic only. On July 26, 1974 the jury returned its verdict finding Dennis Kehn guilty of 30 counts and not guilty of counts 2 and 3. The jury also found Peter Mihalic guilty of counts 10-12 and 23-32. The defendants were then sentenced as appears of record.

Upon appeal, both the Court of Appeals, Eighth Judicial District, and the Supreme Court of the State of Ohio, affirmed the judgment of the Common Pleas Court.

State's Evidence

A series of ten separate burglaries and/or break-ins, and related crimes, were committed in the far east side

of Cleveland, Ohio between March 28, 1971 and March 7, 1972. All of these crimes, with which both petitioners were charged, were committed in the Sixth Police District. These burglaries and other crimes were committed generally by a group of about five to six burglars and the help of either or both petitioners. The burglars were not always the same on each date. However, Charles Broeckel and Philip Christopher did participate in all of the crimes.

The petitioners, Lt. Peter Mihalic and Sgt. Dennis Kehn, were both policemen assigned to the same platoon, or shift, in the Sixth District. The majority of the crimes were committed while the two police officers were assigned to the third platoon and on every third month. The offenses relating to Stakich Realty and Superior Savings & Loan Association were committed on the day that both defendants were working the second platoon or shift. Each of the crimes were fully investigated by the Cleveland Police Department immediately after they were discovered without positive results.

Just prior to Christmas in 1973, Detective James P. Sweeney, Intelligence Unit of the Cleveland Police Department, received a letter from Charles Broeckel who was then serving time in the Chillicothe Correctional Institution in Ohio. As a result of receiving this letter, two agents of the F.B.I. and Detective Sweeney talked to Charles Broeckel about certain crimes and on or about January 4, 1974 Charles Broeckel first talked about some of the crimes in Cleveland, Ohio, that were committed with police help. On January 31, 1974 he made a statement listing each crime; he named his accomplices, and also detailed the participation in the crimes of two Cleveland Police Officers. He named Sgt. Dennis Kehn and Lt. Peter Mihalic.

As a result of the information obtained from Charles Broeckel, an investigation began anew into the unsolved crimes. The investigation was conducted by Sgt. Edward Kovacic, Det. James P. Sweeney and Det. Rocco Polutro, all three of the Intelligence Unit of the Cleveland Police Department (R. 1707).

For purposes of this statement of fact, the crimes will be listed in their order of occurrence.

Charles Broeckel testified that on March 28, 1971, he, Philip Christopher, and a group of other burglars made an entry into the Cleveland Federal Savings & Loan Assn., 18320 Euclid Avenue, Cleveland, Ohio, with the intent of taking out the safe. He testified that Sgt. Dennis Kehn was one of the burglars; that he, Dennis Kehn, sat in a police car in a parking lot above the bank overlooking Euclid Avenue. In this police car with defendant Kehn was another burglar who held a .45 caliber machine gun. Charles Broeckel testified that Sgt. Kehn ". . . was supposed to back off anybody that came in and he was supposed to reroute any cars that would come into the area, police. He was supposed to stay up there on the back and give us a watch." (R. 903-04). The machine gun was to be ". . . well, the purpose I explained was in case cars pulled in, because there was no way to get out of there; to spray the top of the area. . ." (R. 896-7).

Charles Broeckel testified that after making the entry and in testing the voltage in the alarm wires connected to the safe, that the alarm went off; the burglars scattered; Charles Broeckel and Philip Christopher ". . . went up the hill, got in the police car. . ." (R. 901) and were driven from the scene by Sgt. Kehn.

Patrolman William E. McGrath, one of the first police officers on the scene in response to the bank alarm at 4:14 a.m., was assigned to car 643 in Zone 643 where the bank was located. He testified that he met defendant Kehn earlier in his tour of duty and Kehn stated to him ". . . he (Kehn) would be up in the bowling alley parking lot (just above the bank) . . . he was going to meet . . . a girlfriend . . . there. . ." (R. 223). He also stated he, McGrath, did not go up into the parking lot above the bank that night because ". . . Sergeant Kehn said he was going to be up there. . ." (R. 229). Patrolman McGrath further testified that he did see a police car in the bowling alley parking lot that night at about 1:00 a.m. but he did not see who was in the police car. After receiving the bank alarm, Patrolman McGrath responded and stated that Sgt. Kehn arrived on the scene about five minutes later.

Charles Broeckel referred to the Cleveland Federal Savings & Loan Assn. as *Women's Federal* (R. 893-4). In Sgt. Kehn's duty report for the day he refers to the events as follows: "4:10 a.m. 18314 Euclid—Women's Federal Bank—Holdup alarm—responded along with 643 and 644—place entered—unlawful entry of financial institution." State's Exhibit No. 8 3/28/71 (R. 2328). The evidence showed that there was no Women's Federal in the entire Sixth Police District. Charles Broeckel also testified that he knew Dennis Kehn was one of the police who investigated the break-in because we told him to do so (R. 1090).

Charles Broeckel testified that the next burglary (mark), with assistance of the police, after Cleveland Federal Savings & Loan Association, was the Pick-N-Pay Store at the Euclid-Green Shopping Center on April 17, 1971. The evidence of this crime was offered under Ohio Revised

Code, Section 2945.59 *Proof of Defendant's Motive.* Prior to the burglary, Charles Broeckel talked with Dennis Kehn. Kehn said he had a partner whom he dealt with, Lt. Peter Mihalic (R. 911-12). He, Kehn, said that whatever money he would make, would be split with Peter Mihalic; if Kehn would not be there on the mark that Peter Mihalic would and vice versa. Charles Broeckel told Kehn that in relation to money they (the police) would get one end (R. 913):

> "A. End is equal end of whatever comes off the mark. If there is five of us and he made the sixth one, that would be six people. I said, I don't care if you have four people or one person or five people, you get one end, do with it what you want."

Charles Broeckel testified that on that particular burglary both Dennis Kehn and Peter Mihalic participated. However, the burglars were unsuccessful in opening the store safe because of improper torching.

The next burglary occurred at Gale's Bi-Rite Market, 709 East 185th Street, Cleveland, Ohio, on June 14, 1971. Prior to the burglary Charles Broeckel discussed same with Dennis Kehn and Philip Christopher at the Redwood Bar (R. 918) located on St. Clair Avenue near London Road. The bar was owned by Philip Christopher.

Charles Broeckel testified that Dennis Kehn was to meet the burglars on East 185th and he was going to use his police car, ". . . we were going to take the safe right out of there. . . His car was supposed to be parked on East 185th facing south . . . in case any call came over the radio, his recall lights came on and we came shooting out the back." (R. 919). While the burglars were getting ready to move the safe out of the building, the police recall lights came on. The police car proceeded

around the back of the building . . . Charles Broeckel, Philip Christopher and another burglar jumped into the police car which then sped off. Within minutes other police cars arrived to investigate the burglary.

Mr. James Valtman, who lived behind the store, saw a white truck near the store and two men enter the store at about 3:00 a.m. He then called the police. Sgt. Dennis Kehn later responded to the scene to investigate same. His duty report shows that immediately prior he was at a Society Bank alarm (R. 389-91) and a Gasco Station holdup. However, officers who investigated these matters testified that they could not recall Dennis Kehn being there (R. 1458-61).

Frank Yaris—victim of Gasco robbery—saw no sergeants or officers on scene to investigate robbery of which he was a victim (R. 783-4).

Stolen from Gale's Bi-Rite was a .28 caliber pistol and $75.

The next burglary occurred at the Pick-N-Pay Store No. 35 located in the Euclid-Green Shopping Center on June 17, 1971. This is the same store where the burglars failed to properly burn the safe open in April, 1971. Charles Broeckel testified that this burglary was pre-arranged and that he discussed it with Dennis Kehn at the Redwood Bar.

The burglars arrived at the scene at approximately 12:30 a.m. Dennis Kehn was to give the burglars an off from the parking lot (R. 928):

> "A. In other words, no cars could pull in that parking lot except one way. There is an entrance and there is an exit. There is a retaining, a small retaining wall and there is a bank in front. By the

time any car gets way back to where Pick-N-Pay would be it would take them 35, 40 seconds. The police car was up there. They could call us on the walkie and give us a warning."

Charles Broeckel testified that the burglars backed off twice; that Dennis Kehn got a call to go someplace and the burglars backed out the back door after they had jumped the alarm. When Dennis Kehn came back, ". . . he called us on the walkie. Then we went back in and finished burning the safe." (R. 929). Dennis Kehn's duty report for that night showed that he did respond to 16410 Euclid, a disturbance, along with car 644 at 1:35 a.m., also he responded to another disturbance at Olympia and Cliffview with car 644 at 1:35 a.m. (R. 2947, State's Exhibit No. 8, 6-17-71). Both places were within the immediate vicinity of the Euclid-Green Shopping Center. Taken from the safe in this burglary was $11,000.

The burglary of Alvin's Jewelers, 690 East 185th, Cleveland, Ohio, began on a Saturday night and continued into Sunday, a.m., June 27, 1971. Charles Broeckel testified that he discussed it with Dennis Kehn, Philip Christopher and the other fellows that were going on the mark (R. 940). These discussions took place, "at the Redwood out in the parking lot. Whenever I say the Redwood, it is not in the bar itself. It was always from earshot." (R. 941).

Prior to making entry into the jewelry store, the burglars were working on a bypass device of the ADT alarm on a telephone pole behind the store. The burglars were on the air with Dennis Kehn by walkie (R. 942). Charles Broeckel testified that it took about 1 1/2 hours to jump the alarm. Dennis Kehn ". . . had to be someplace on 185th within a three block radius." He was supposed

to, "Give us a call in case the alarm dropped while we were working on it. If we shorted it and it dropped he would get the call on his radio." He further testified that Dennis Kehn left shortly before they had the alarm jumped. The burglars then entered the building and proceeded to torch open the safe.

While the double door safe was being burned, a tear gas device was lit. Because of the gas, only part of the safe's contents were taken. The burglars planned to come back in the afternoon to get at the jeweler's safe that was inside the safe they torched open.

The burglary was discovered on Sunday evening by John A. Faris who lived behind the store when he saw a ground wire attached to his water faucet. The wire ran to the telephone pole where the burglar's ADT bypass device was found. The police were called at approximately 8:30 p.m.

The investigating police officers (R. 1560), detectives (R. 311) and superior officer (R. 1560) all discussed setting up a detail in the event the burglars decided to come back.

Charles Broeckel further testified that they started to come back on Sunday afternoon but people were swimming in an outside pool behind the store. He then called Dennis Kehn by phone at his home to find out if there was any kind of set upon the mark as they couldn't check it because of the people (R. 948). Later, Philip Christopher phoned Dennis Kehn and Dennis Kehn said he thought it was set up. So, the burglars backed off feeling that the burglary was probably discovered and the police were laying on it (R. 949). Detective Nick Stanic, and his partner, in response to a district assignment did give Alvin's Jewelry special attention, after the break-in was discovered (R. 211 and 213).

The value of the watches and jewelry actually taken amounted to $23,578.39.

The burglary of Sydney's Men's Wear, 18225 Euclid Avenue, was committed on September 5, 1971. The store was in the Euclid-Green Shopping Center. Charles Broeckel testified that the plans to burglarize Sydney's were made as follows (R. 962):

> "A. With Phil Christopher, myself, Al Pannetta, Michael Rayn, Herman Holley and Denny Kehn, and at that particular mark Denny Kehn wasn't going to be on. I don't recall what the reason was, whether he was on vacation, working in the office or what, but Pete Mihalic took his place."

The evidence shows that Dennis Kehn was assigned that night as officer in charge of the station located at East 152nd Street off of St. Clair Avenue, and that he began his tour of duty at 10:30 p.m. on September 4, 1971.

Charles Broeckel further testified that between the hours of 12:30 and 1:00 a.m., September 5th, the burglars jumped the alarm in back of the building with a battery by-pass; picked the lock on the front door. Peter Mihalic was on Euclid Avenue (R. 964):

> "A. Well, we had the police car with Peter Mihalic in it. He was placed right on Euclid Avenue, which would be to the left. If you were inside the place, it would be to the left toward the exit as you go out, and with a walkie-talkie. He had one of our walkies.
>
> Q. And what was Pete Mihalic supposed to be doing there?

> A. He was to back off any car or give us an off if a call came over the radio, if we were spotted by anybody."

After making their entry, the burglars filled a car and truck with merchandise. The burglars then backed off to steal another truck. They went to the 20th Century Lanes at 16525 Euclid Avenue, and stole a 1962 Ford panel truck, the property of Sylvio Panichi. This truck was then also loaded with stolen merchandise.

Charles Broeckel testified that during this period of time Peter Mihalic was on Euclid Avenue. He asked Peter Mihalic how he was going to explain the time. Peter Mihalic then lifted the hood of the police car and pulled the radiator hose off. He said he was going to call for a tow and figured it would take two hours to get there (R. 967).

The burglars finally left at about 5:30-6:00 a.m.; Peter Mihalic's car was still on Euclid Avenue near the exit of the shopping center (R. 968). The clothes were taken out to Eastlake and the stolen truck was found empty three days later in Willoughby, Ohio. The owner of the store testified that $27,000 in men's clothing was stolen.

Peter Mihalic's duty report for the night showed no special assignment. However, the report shows him to be in the vicinity of the Green Light Shopping Center from 3:25 a.m. on. At 4:30 a.m. his report shows in part, "18513 Euclid Avenue, radiator hose or hoses broken, car heating up, tow ordered. (6:00 a.m.) tow arrived . . ." (9/5/71—State's Exhibit No. 6, R. 2976.) The tow truck driver testified as to towing the car and the City of Cleveland work report authorizing repairs on his police car was introduced in evidence. (9/5/71—State's Exhibit No. 7 R. 2977.)

While the Sydney burglary was in progress, Patrolmen Rojc and Bozich drove into the shopping center at about 2:15 a.m. As they entered, Lt. Mihalic, their supervisor, drove up alongside of their car (R. 380). Patrolman Rojc stated that Peter Mihalic told them the shopping center checks OK (R. 364). The patrolmen then left on another radio assignment to an armed robbery at East 125th and St. Clair without checking the shopping center (R. 380).

William Henry, a paperboy who lived on the street next to the shopping center, testified that at 5:30 a.m. he saw some suspicious males on his street and a Cadillac auto of which he took the license plate number (R. 1412). This license plate listed out to Charles Broeckel (R. 1418-19).

The burglary of the Pick-N-Pay Super Market, 18501 Neff Road, occurred on September 24, 1971. Charles Broeckel testified that he and Philip Christopher made the plans for the burglary and that they discussed them with Dennis Kehn behind the Redwood (R. 974-5) in the back. ". . . Dennis Kehn was supposed to park in the parking lot by a pay telephone that sits in the parking lot right at the edge of it on Neff Road." (R. 976).

Pursuant to the plans, the burglars drove two cars on Bella Drive, walked between apartments to the rear of the Pick-N-Pay Store. They then proceeded to make their entry into the store by cutting through a corrugated metal ceiling. The alarm was cut away by use of a jumper wire (R. 978).

James and Judy Kosmerl resided on the third floor at 18901 Bella Drive. At approximately 1:00 a.m. Mrs. Kosmerl heard doors slam and saw a group of approximately six males going through her yard with tools. Two cars were parked directly in front of the apartment. James

Kosmerl called the police. Patrolman Candow and Patrolman Holbert arrived to investigate. While the patrolmen were on the scene Sgt. Dennis Kehn, their supervisor, also arrived on Bella Drive. Both officers testified that they saw and talked to Sgt. Kehn (R. 719 and 819). The patrolmen then parked in a driveway off Bella Drive to wait for the return of the males. They then received two other radio assignments and left the scene at about 2:00 a.m. One of the autos was listed to Glenda Cantwell, wife of Herman Holly, one of the burglars (R. 1783). For the other car there was no immediate listing, but it was later found to have been driven by Charles Broeckel (R. 1782).

Both Kosmerls testified that the two police cars arrived on the scene. The first being a stationwagon with the two patrolmen and the second a four-door sedan with one occupant. Charles Broeckel further testified that after jumping the alarm he received a call from Dennis Kehn on the walkie (R. 978):

> "A. He said come over by the car. So, I went over by the car and he said, there is a stakeout on your car. Somebody spotted your cars over there on Bella Drive. I don't know what it is about, but people over there. I am going to go check it. You better get out of here."

Charles Broeckel and the burglars left the area and went to the Redwood (R. 980):

> "Q. Okay. What happened then at the bar, if anything?
>
> A. We waited there for a while. Then, Denny came back. He told us there was a stakeout on the car and he would come back again and let us know what exactly was going on. In other words, he hadn't

found out—determined it yet whether it was still on. He didn't know why. Somebody called in the apartment building. They spotted some guys leaving through the yards.

Q. Who told you this?

A. Dennis Kehn.

Q. And then what happened?

A. He didn't know how long the stakeout was going to be for. So, we said we would wait there. So, he came back before closing time, I remember, and he said the stakeout is off. He said, in other words, they just laid on your cars for a while and it was supposed to be off."

Larry Sartain, the bartender of the Redwood drove Charles Broeckel to the area of the Pick-N-Pay store where the burglars again met with Dennis Kehn (R. 981). Larry Sartain said he saw Philip Christopher ". . . talking to a police car." (R. 773) at that time. The burglars then re-entered the store and proceeded to burn the safe. People began coming to the store and the burglars left without actually opening the safe.

The burglary of Uncle Bill's 16300 Lakeshore Boulevard, occurred on December 20, 1971. Charles Broeckel testified that the plans for this mark were made by himself, Philip Christopher and Dennis Kehn (R. 991-92):

"A. The plans were to go up there where the wires came off the phone pole and came down. They had conduit on a little space like that, before the concrete of the sidewalk. We were going to chop the wire there, pull a car up to the pole, chop the wire and then back off it, back off it and Denny Kehn would be within the first call on the radio distance where he would answer the call when the alarm went.

Q. And do you know where Dennis Kehn was supposed to be parked?

A. He was parked on 157th Street near the Stone Front Cafe."

Charles Broeckel testified that the alarm wire, outside and in front of the building, was cut with an ax. Dennis Kehn was in the first police car to respond. He was followed by Patrolmen Holbert and Candow. Dennis Kehn then returned to the Stone Front Cafe where he met Charles Broeckel and Philip Christopher (R. 994):

"A. We asked how many employees it was in there.

Q. What did he say?

A. He said they said three women and two guys.

Q. Okay.

A. They couldn't come out. They were locked in. He couldn't go in. He talked to them through a glass door. They said they had trouble with the alarm system before and they weren't going to call the manager and bother him. He would come in the morning and reset it."

Judith Dressler, one of the employees testified that the burglars made their entry into the store at 5:00 a.m. or a little later (R. 539). The entry was made by prying open an overhead corrugated door. The burglars were all hooded and armed. They rounded up the employees at gunpoint. They were two females, Judith Dressler and Loretta Richards, and three males, David Kozlowski, Danny Skiljan and Charles McGrue.

David Kozlowski was asked by one of the gunmen, "how many of us were in the store and I told him there were five of us and he said, three women, and I said no, there was only two women . . ." (R. 566).

Dennis Kehn made two separate reports in which he made reference to the original alarm at Uncle Bill's his investigation, and the number of employees in the building:

> ". . . On December 20, 1971 at 1:48 a.m. received a broadcast of telephone alarm, Uncle Bill's . . . responded . . . upon arrival checked the front doors and found same to be secure . . . 642 arrived moments later . . . I observed, through the most westerly door . . . two . . . males stocking shelves, knocked on the door, and the males came to the door. I questioned the males concerning the alarm. They informed me that they were unaware of the alarm and that nothing was wrong at Uncle Bill's. They further stated that there were three girls in the building working. . ." (State's Exhibit No. 4 and No. 5, R. 3071-2).

The burglars locked all five employees in the men's room and proceeded to burn open two safes. They took from Uncle Bill's $48,297.43 (R. 638).

The burglary of Stakich Realty Co., 804 East 185th Street, and entry into the Superior Savings and Loan Association, 798 East 185th Street, occurred on January 16-17, 1972. Both businesses were in the same building and abutted each other.

Charles Broeckel testified that he discussed this crime with Philip Christopher, Peter Mihalic, Dennis Kehn and four other burglars (R. 1012) at the Redwood Bar; that at approximately 8:00-8:30 p.m. on the night of the burglary that he and Philip Christopher went to the Superior Savings & Loan Association with the intent of picking the

front door lock. Dennis Kehn was parked in front of the LaSalle Theatre, diagonally across the street (R. 1015):

> "Q. And what was Dennis Kehn supposed to do by the theater?
>
> A. He was more or less blocking me talking to somebody over there and he was just giving us a general off. In other words, while we tried to pick it, the lock, because we intended to try to pick the lock earlier and test the alarm system and make it later."

Charles Broeckel further testified that it was a bitterly cold day, and he was unable to pick the lock. As a result, the lock on the rear door of Stakich Realty was vice gripped and entry made. At that time Dennis Kehn and Peter Mihalic were parked on East 185th Street about a half block from the bank (R. 1016-17):

> "Q. And what were they supposed to be doing out there while you were making your in?
>
> A. Well, originally, like I said, we were going to go in there to try to jump the alarm on it and they were giving us an off. In other words, the police radio, their radio, if we set it off they would have let us know on the walkie right away.
>
> Q. And did you see both Mihalic and Kehn out there?
>
> A. Positively. I handed them my walkie."

While in Stakich Realty the burglars banged open a small safe. In the basement they sledged the wall between the real estate office and bank. They then bypassed the bank burglar alarm. As to Peter Mihalic and Dennis Kehn, Charles Broeckel further testified that (R. 1022-3):

"A. Well, at that time it was running late. I don't remember the exact incident, I can't—positively. I know they were there later than they should have been and like they were overtime on their schedule, you know, or had to get in the office or their trick was over. I just don't recall. They left. We told them to go. We picked up the walkie from them.

Q. Do you know how long they stayed out there, approximately?

A. I can't say positively, but I would say around midnight, 12:30 maybe, that they left. Somewhere around there."

The burglars torched open the bank vault and inner safe. They took from Superior Savings & Loan Association the amount of $61,785 in cash and $25,020 in Travelers Checks (R. 1404).

Vitalija Bitkus, 781 East 185th Street, testified that on the night of the burglary, she looked out of her second floor window for her husband's car. ". . . I noticed there was a Cleveland Patrol car parked in front of the bank and it was late that night, because it was after 12:00." She further stated that the police car was a sedan and that it was there about an hour (R. 721). Her husband, Raymond R. Butkus, testified that he left Cleveland Heights after midnight to go home. When he arrived he also noticed a police car parked in front of the bank. He also stated it was the coldest day of the year (R. 726-8). Both Dennis Kehn and Peter Mihalic should have gone off duty at 10:30 p.m.

Dennis Kehn's duty report (1/17/72, State's Exhibit No. 25) (R. 3035) shows that he was at the LaSalle Theatre at 8:00 p.m. on January 16, 1972. He showed no other special assignment for the remainder of his tour of duty.

In addition his duty report indicated he was assigned to, "Sixth District, 630, Sector two." The numerals 630 can designate either a car number, call number or both. Lt. Cousino testified that he reported for duty at 11:00 p.m. on the 16th, a half hour after Dennis Kehn was supposed to have gone off of duty; that he normally drove car 630 but it was not available at that time so he drove another car (R. 2251-2). However, car 630 was used by Sgt. Malloy at 6:30 a.m. the following morning (R. 2254).

Peter Mihalic's own duty report (1/17/72, State's Exhibit No. 32) (R. 3042) shows him to be at the Slovenian Home, 6419 St. Clair Avenue at 4:50 p.m. on January 16, 1972; at the Cleveland Convention Center with the knowledge of Captain Shillat at 6:00 p.m.; again at the Slovenian Home at 7:30 p.m. and no special assignment thereafter. Sgt. Donovan who was in charge of the Slovenian Home detail, a testimonial for Mayor Perk, from 4:10 p.m. to 10:00 p.m., did not recall Lt. Mihalic to be there (R. 1477-8), nor did Ptl. Stigerald who was there from 7:00 p.m. to midnight (R. 1562-4). Captain Shillat testified that he gave no permission to Peter Mihalic to go to the Cleveland Convention Center which was outside of the Sixth District (R. 1495-7).

The burglary of Cleveland Industrial Vending Co., 485 East 140th Street, occurred on March 7, 1972. Charles Broeckel testified that he discussed this mark with Philip Christopher, Dennis Kehn and three other burglars. He stated that (R. 1032-3):

"A. We jumped the alarm out on the pole in the back of it and Pete Mihalic and Denny Kehn were in the corner of a gas station, little Gulf gas station on the corner of Westropp and 140th.

Q. What were Pete Mihalic and Denny Kehn supposed to do?

A. They were on the radio and back off any cars that they knew would come up in the area in case of anything.

Q. And do you recall what time you made your in?

A. It was late at night. It was like maybe 1:00 o'clock, 12:30, somewhere at that time."

The burglars made their entry at about 1:00 a.m.; went into the office and proceeded to burn open two safes. The money in the safes was mostly in coin. To take all the money the burglars stole one of the company refrigerator trucks. Prior to loading the truck, they received a call on the walkie that a truck was coming in. This call came from Peter Mihalic and Dennis Kehn in the police car (R. 1034). As a result of the call (R. 1035):

"A. We stopped working. It was a delivery truck, a guy that delivers donuts, and he had a key to come in the side door that we entered, that we had vice-gripped. He was in the back of the truck getting his donuts ready. He got them all like this and came in the side door. When he came to the door one of the guys opened the door right with him and he must have thought he turned the key in the lock because the lock wouldn't work and he comes walking in and we took him off.

Q. What do you mean, we took him off?

A. Tied him up and put the pistol on him."

The donut man who entered the door during the course of the burglary, and who was assaulted as herein referred to, was Randal Keen (R. 740).

The burglars then loaded up the truck and left. $26,-500 was taken (R. 651). On the same day, Albert Duncan of the Penn Central Railroad Police Department, found the Cleveland Industrial Vending Co. refrigerated truck abandoned on railroad property in the Collinwood Terminal. He found the ignition to be tampered with and in the truck were empty money bags and some coins scattered around (R. 1438-40).

The evidence further indicates that Peter Mihalic was one of the investigating officers who arrived on the scene shortly after the burglary was discovered. However, his duty report for the day was never located (R. 1746-7).

Defendant Kehn's duty report for the same day (3/7/72, State's Exhibit No. 9, R. 3051) indicates that at 11:25 p.m. he "conferred with 602 concerning the victim of robbery at 647 Lakeview—advised armed robbery report . . ." However, the police officer, William Salupo, who investigated the robbery stated he could not recall Dennis Kehn, or any other police car, responding to the scene (R. 1514-15). The balance of defendant Kehn's report shows no special assignment.

Charles Broeckel further testified that the payoff to the two policemen was made to Dennis Kehn at the home of Philip Christopher and in coin (R. 1037-8). A photocopy of a deposit slip, dated 5/25/72, State's Exhibit No. 10, shows $140 in coin deposited to the checking account of Dennis Kehn in the Cleveland Trust Co. Similarly, a photocopy of a deposit slip, dated 7/13/72, State's Exhibit No. 12, shows $102 in coin deposited to the joint checking account of Peter Mihalic and Joan M. Noble at the Society National Bank. These two exhibits were admitted into evidence without objection on behalf of either defendant (R. 1816).

Sgt. Edward Kovacic of the Intelligence Unit of the Cleveland Police Department testified that on June 22, 1972, pursuant to a search warrant, that he participated in the search of Philip Christopher's home at 897 Rudyard Avenue and that they found (R. 1758):

> "A. We found ADT boxes, various parts of ADT alarms, what we call jumper wires. Wires that are used to bypass alarms, clips, wires, tools of all sorts, drills, motors, hydraulic jacks, a .38 and papers."

Among the papers found was an address book (State's Exhibit No. 18). In the book was the name "Denny the Cop" and the phone No. 531-2407 (R. 1788). The phone number was listed to the defendant, Dennis Kehn, at his address 19560 Ormiston. Also in the book were the names and phone numbers of Charles Broeckel, Mario Durant, Emil Dinzio, Herman Holly, Al Panetta, Mike Ryan, Al Walch, and the Redwood. All of these names were testified to as being fellow burglars of Charles Broeckel.

Also found in the search of Philip Christopher's home was a piece of paper with the printing of Alvin's Jewelers and certain alarm information thereto (R. 1763—State's Exhibit No. 16).

Evidence was introduced to show that defendant Peter Mihalic deposited into his personal checking account at Central National Bank the amounts of $5,557 in 1971, $10,-680.09 in 1972, and $12,577.85 in 1973 (R. 1651); that in 1972 and 1973 his deposits exceeded his take-home pay (R. 1644). Also, that he had a joint checking account with Joan M. Noble, a woman not his wife, from October, 1971 to the time of trial at the Society National Bank (R. 1663). Further, that on October 29, 1972, he purchased a 1971 Cadillac for $6,100 in cash (R. 1637-8).

As to Sgt. Dennis Kehn, records were introduced to show that his Cleveland Police Department Credit Union Savings Account increased from a low of $44.98 (R. 1684) in 1971 to a high of $7,792.79 (R. 1693) in 1973. Also, that his wife purchased a 1971 Oldsmobile on September 29, 1972 (R. 1639-41). The purchase price was $4,000.

Larry Sartain, the bartender at the Redwood, testified that he knew both Dennis Kehn and Peter Mihalic as policemen; that he saw Dennis Kehn in the Redwood a couple of times both in and out of uniform, and that he saw Peter Mihalic in the bar once in uniform. He further testified that he knew Charles Broeckel and all of the other unindicted co-conspirators individually and either personally or as patrons of the Redwood (R. 769-77).

Detective Viola (R. 146) and Sgt. Vanyo (R. 658) testified that they had observed all of the unindicted co-conspirators at the Redwood Tavern over a period of time and that they were known to frequent the tavern.

Capt. Joseph F. Mengel, Sixth District Platoon Commander and direct supervising officer of Dennis Kehn and Peter Mihalic testified that normally officers, lieutenants and captains, drove four-door sedans and that patrolmen normally drove station wagons (R. 469). He further testified that officers were not required to sign out for any particular car nor were they required to check in to show that they returned a certain car to the district; that no one would question what car they took. He further stated that it was a common practice that quite a few officers had made their own keys for various cars (R. 470-71).

Generally, the officers of the Sixth Police District rode separate cars and were assigned separate areas to cover. Capt. Charles Mauk, also assigned to the Sixth District knew both defendants and worked the platoon

that followed theirs in 1971 as a Lieutenant. During that year he saw Dennis Kehn and Peter Mihalic come in together after their tour of duty, in the same car, later than usual on two, three or four occasions (R. 1540-41).

Ptl. Richard M. Tanski, a member of the police department for seventeen years was assigned to the Sixth District from 1967 to 1973 and worked the same platoon as Peter Mihalic and Dennis Kehn. He testified that on certain occasions he did see Dennis Kehn and Peter Mihalic leave the station together in the same car. Dennis Kehn would park his supervisory car in the parking lot where civilian cars were parked and leave with Lt. Peter Mihalic. This would occur during the third shift, two or three hours after roll call. He further testified that while Dennis Kehn was officer in charge of the station he, Dennis Kehn, left the building on occasion a few hours after roll call and someone else would come in for a period of time (R. 1618-21).

Defense Evidence

Both petitioners presented evidence on their own behalf. Twenty-two witnesses testified in behalf of Dennis Kehn and twelve witnesses were called in behalf of Peter Mihalic.

Dennis Kehn testified that he did patronize the Redwood Bar in and out of uniform (R. 2285-6); that he knew Philip Christopher, Paul Sharaba and Pete Sanzo; and that he also knew Charles Broeckel in 1970, 1971 and 1972 (R. 2402). He also testified that during that period of time he had no other employment.

Peter Mihalic testified that he had been to the Redwood once; that he knew Philip Christopher but did not know Charles Broeckel; that he earned extra income helping to collect paper and junk but he had no income tax or other records to substantiate same; and that when he purchased the Cadillac for $6,100 in cash it was from money he had on hand at home (R. 2617).

Post Trial Proceedings

The jury returned its verdict on July 26, 1974. On August 5, 1974 the jury foreman, Anthony Parete, sent to the trial judge a small spiral notebook (Court's Exhibit No. 2), a series of legal cap sheets (Court's Exhibit No. 3), a single legal cap sheet (Court's Exhibit No. 4), and an accompanying letter (Court's Exhibit No. 5) explaining the enclosures. On August 19, 1974, all of the jurors were examined by the court individually, in the presence of counsel for all sides, in relation to these exhibits, "to inquire into just exactly what extent or to what extent these particular paper writings were involved in the jury's deliberations." (St. Supp. Tr. 5).

The foreman stated he took notes daily outside of the courtroom (St. Supp. Tr. 17). He explained the use of the notebook as follows (St. Supp. Tr. 11):

> "THE COURT: Okay. Now, going back to these again. What use was made of this black book which we are calling the notebook or the daily diary in the jury room. How was it used?
>
> MR. PARETE: Mostly just for my own recollection and then there was a question as to something that I happened would refer to it, but only with the strictest understanding that I would be open to correction or addition or what was there was not to be considered as definite; because the only definite thing would have been the transcript from the trial, and

if you do examine the books sometimes it just a general—like somebody's name and then just: Gave account of break-in.

I don't quote him, I didn't put down any facts. It was just the fact that this person could be pinpointed to a certain crime by way of being a witness."

The legal cap sheets was a chart system of all the crimes, prepared by the foreman after discussion with the other jurors during deliberation. "I either added or deleted or put down what they considered to be most important thing" (St. Supp. Tr. 10).

The single legal cap sheet (legal concepts) Mr. Parete said ". . . That was mostly for me." (St. Supp. Tr. 10, 14 and 22-3).

The letter sent to the court (Court's Exhibit 5), basically states the same as to which Mr. Parete testified in relation to the notebook and other sheets of paper.

Each of the jurors was asked individually, and not in the presence of the other jurors, to what effect, if any, did the notebook or these papers or the use thereof have on their verdict. Each juror answered, "none whatsoever," or words of similar import (St. Supp. Tr. 46-67).

REASONS FOR DENYING THE WRIT

1. A judgment will not be reversed because of misconduct of a juror, in making and use of notes, unless prejudice to the complaining party is shown.

The question presented by petitioners in regards juror note taking is not one of constitutional dimension. The cases cited by petitioners, *Turner v. Louisiana*, 379 U.S. 471-473 (1965) and *Parker v. Gladden*, 385 U.S. 363, 366 (1966), indicate a factual situation wherein there are direct outside or external influences by persons (two deputy sheriffs and a bailiff) exerted upon the jury.

In the case now before this Court, the facts show that at the commencement of the trial, after the jurors had been sworn, and prior to the taking of any evidence the jurors were told by the court in part as follows (R. 97):

"You are not permitted to take notes or ask any questions during the course of trial. Therefore, again, you can see that it is vitally important that you pay strict attention."

Petitioners state in their brief that the court repeatedly told the members of the jury that they could not take notes during the trial. This is not so. On at least sixty-three separate occasions during the trial, prior to recesses and evening adjournments, the court talked to the jury (R. 107, 135, etc.). On not one of those occasions did the court in any manner refer to note taking or admonish the jurors in regards thereto.

The one juror, who took notes, did so either at home or on the bus ride home from the courthouse. The notes

were not made in the courtroom (SR. 17-18). Subsequent to the trial, the court called the juror who had volunteered the information about the notes and inquired as to time and method whereby the notes were prepared as well as to what extent the material was used during the jury's deliberations. The court also called each of the other members of the jury in an effort to determine what effect, if any, the notes had on the decision reached by each juror individually (R. 45-66).

The Court of Appeals in commenting on the trial court's procedure, stated at page 20 of its opinion:

> "From our review of the supplemental transcript of proceedings, we conclude that the use in the jury room of the notebook and sheets listing the testimony relating to each crime did not prejudice the appellants. The record fails to disclose that Parete himself made some *effective* use of the notes during the deliberations or was able to use them in such a way as to persuade his peers. As noted previously, each of the other eleven jurors testified under oath that they reached their individual verdicts independent of the notes in question.
>
> "We also conclude that the presence in the jury room of the paper containing the legal concepts and definitions did not operate to the prejudice of the appellants. There is nothing in the record to indicate that the jurors relied on this information, and it is indeed highly unlikely that they did, given the fact that the court's written instructions were in the jury's possession during their deliberations (R. 2916) and given the court's final instruction to the jury that they should '. . . apply the written instructions in all instances' (R. 2918)."

At pages 16 and 17 of the Court of Appeals decision, it held:

> "It is well settled that the denial of a motion for a new trial based upon the misconduct of a juror will not be reversed on appeal absent a showing that the trial court abused its discretion. *Pearson v. Gardner Cartage Co.* (1947), 148 Ohio St. 425; *Maggio v. Cleveland* (1949), 151 Ohio St. 136, 144; *Weaver v. Gale* (App. 1949), 56 Ohio Law Abs. 178. In addition, it is established that absent a showing of prejudice to the complaining party, a judgment will not be reversed because of the misconduct of a juror. *Armleder v. Lieberman* (1877), 33 Ohio St. 77. Thus despite the misconduct of one juror, a case may nevertheless be free of prejudicial error when the remaining jurors indicate that they were not influenced by anything that the one juror might have done. *Cleveland Ry. Co. v. Haycox* (App. 1923), 1 Ohio L. Abs. 330."

As to evidence aliunde, it is well established that the verdict of the jury may not be impeached by the testimony of the jurors who rendered the verdict unless there is evidence aliunde impeaching the verdict.

In *State v. Adams,* 141 Ohio St. 423 (1943), the court states on page 427:

> "The so-called *aliunde* rule, generally recognized by the courts since the day of Lord Mansfield who is supposed to have first announced it in the case of *Vaise v. Delaval,* 1 T.R., 11 (K.B.), 99 Engl. Rep. R., 944, is to the effect that the verdict of a jury may not be impeached by the evidence of a member of the jury unless foundation for the introduction of such evidence is first laid by competent evi-

dence *aliunde*, i.e., by evidence from some other source. . ."

Also see, *Wicker v. Cleveland*, 150 Ohio St. 434 (1948) and *State, ex rel. Hetzler v. Snyder*, 63 Ohio L. Abs. 42 (1950).

The Court of Appeals held that ". . . The evidence presented to the trial court was not evidence aliunde of juror misconduct and, furthermore, assuming the evidence was properly receivable to impeach the jury's verdict, there was no showing that the taking and using of the notes by the jury prejudiced appellants' case in any manner."

The Supreme Court of the State of Ohio in this case, *State v. Kehn*, 50 Ohio St. 2d 11 at pp. 18 and 19 held that there was evidence aliunde but that no prejudice to appellants was affirmatively demonstrated.

In Ohio, the making and use of trial notes by a juror may not constitute misconduct and in certain instances may be desirable. *W. H. Davis Die Co. v. Beltzhoover Electric Co.* (1931), 40 Ohio App. 308; *Cleveland, C.C. & St. L. Ry. Co. v. Ullom* (1898), 20 Ohio C.C.R. 512.

In the recent case of *State v. Jackson*, 201 Kan. 795, 443 P.2d 279, *cert. den.* 394 U.S. 908, 21 L. Ed. 2d 219, 89 S. Ct. 1019, it was held that whether jurors should, or should not, take notes is within the sound discretion of the court, and it is not error per se for a juror to take notes, nor is it misconduct which peremptorily requires granting of a new trial, particularly where no showing is made that defendant's rights were prejudiced.

2. The Chapman rule applies only to the test of harmlessness when there is a constitutional error, and has no application in deciding whether such an error exists.

In the case of *State v. Childs*, 14 Ohio St. 2d 56, 236 N.E.2d 545, *cert. den.* 394 U.S. 1002, 22 L. Ed. 2d 779, 89 S. Ct. 1596, the court held in part ". . . He then suggests that the *possibility* of prejudice is enough to require reversal, and for the support of this assertion he relies upon *Chapman v. California*, 386 U.S. 18, which holds that a constitutional error in criminal cases must be harmless beyond a reasonable doubt in order to be considered harmless. This reliance is misplaced. The *Chapman* rule applies only to the test of harmlessness when there is a constitutional error, and has no application in deciding whether such an error exists. There is no established per se constitutional error here."

The taking and use of notes by a juror does not of itself constitute constitutional error

In the case of non-constitutional error, the State appellate courts determine whether or not there was "substantial" evidence of appellant's guilt before it affirms or reverses the judgment of the trial court. *State v. Davis*, 44 Ohio App. 2d 335.

3. Supreme Court Rule 40(1)(d)(2) which provides in part that, "Questions not presented according to [the requirements of this rule] will be disregarded, save as the Court, at its option, may notice a plain error not presented," does not apply to questions presented on a Petition for Writ of Certiorari since the entire trial record is not available to the Court for examination.

Petitioners concede that they did not raise below the constitutional questions asserted in their third question presented for review. They contend, in part, that the trial court's plain error is open to review by this Court under the rationale of *Vachon v. New Hampshire*, 414 U.S. 478 (1974). In *Vachon* this Court stated at p. 479 as to rule 40(1)(d)(2) that ". . . Questions not presented according to [the requirements of this rule] will be disregarded, save as the Court, at its option, may notice a plain error not presented. . ." This assumes of course that the Court has already accepted jurisdiction. The rule is not applicable on a petition for certiorari.

In one of the two factual situations, James Zimmerman was called in behalf of petitioner Peter Mihalic and would have testified that at a particular bar Charles Broeckel did say to him that "these two guys (Peter Mihalic in uniform and an unidentified sergeant in uniform) are no good rotten SOB's or something to that effect." (R. 2783).

The State objected to this testimony because a proper foundation was not laid on cross-examination of Charles Broeckel. The defense contended the testimony to be admissible to show bias or prejudice. The Ohio Supreme Court in *State v. Kehn, supra,* held at p. 19: "The Court of Appeals concluded that this error was harmless beyond a reasonable doubt. After careful consideration, we agree. . ."

Petitioners argue that Zimmerman should have been allowed to testify under the rationale of 3 WEINSTEIN'S EVIDENCE, Section 607 [OS]. This section refers to trials in federal courts and in particular to Federal Rule of Evidence 403, and the federal court decisions thereunder. Federal Rule of Evidence 101, however, provides that the "rules govern proceedings in the courts of the United States . . ." and not in State courts.

In regards the second factual situation, defense witness Al Pannetta was named as an unindicted co-conspirator on the following burglaries: Cleveland Federal Savings & Loan, 3/28/71; Gale's Bi-Rite, 6/14/71; Pick-N-Pay Store 35, 6/17/71; Alvin's Jewelers, 6/27/71; Sydney's Men's Wear, 9/5/71, and Pick-N-Pay, Neff Road, 9/24/71. In addition Charles Broeckel testified that Al Pannetta also participated in the burglary of the Pick-N-Pay Store on 4/17/71, evidence of which was offered under Ohio Revised Code, Section 2945.59 *Proof of defendant's motive.*

During the trial, Charles Broeckel testified that he was not sure, or could not recall if Al Pannetta did in fact participate in the Cleveland Federal Savings & Loan break-in (R. 1126 and 1228-9). Al Pannetta did not testify at the trial.

Defense counsel for Dennis Kehn attempted to introduce records of the Penn Central Railroad to show that Al Pannetta's (an employee), handwriting appeared on the railroad records that were made on the days of 3/28/71 (Cleveland Federal Savings & Loan), 4/17/71 (Pick-N-Pay—sim. act) and 6/17/71 (Pick-N-Pay #35) at or about the time these crimes took place. The attempt to offer this evidence was through fellow employees who stated they were familiar with Al Pannetta's handwriting.

The trial court in not allowing the records into evidence stated in part (R. 1983-4) that ". . . The purpose of this line of inquiry . . . is to impeach the testimony of the State's witness Broeckel as to the whereabouts of a Mr. Pannetta on certain dates and at certain times. The Court is of the mind that this would be to impeach the witness on collateral matters. We have, of course, to also consider the best evidence rule which would require the testimony of Mr. Pannetta either in person or on deposition. . . In the last analysis, assuming the receipt into evidence of this evidence, it would be for the purpose and could only be for the purpose of showing that certain trains entered and left, apparently, the Collinwood Yard of the Penn Central Railroad on the times indicated in those paper writings. . ."

The Supreme Court of Ohio agreed with the trial court, *State v. Kehn, supra,* at page 17:

> "However, the evidence was correctly excluded because it would have created a dispute about extraneous or collateral matters, *i. e.*, Pannetta's participation. Kehn and Mihalic were on trial, not Pannetta, and the court, by excluding the testimony, avoided the dangers of surprise, jury confusion and wasted time which are the reasons for the rule against impeachment on collateral matters.
>
> The trial court's exercise of discretion involved the weighing of the probative value of the offered evidence against its potential misuse by the jury. No abuse of discretion is evident, and this proposition of law is accordingly overruled."

CONCLUSION

We respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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